2434

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 585 209.

THE CAPITAL CITY LIGHT AND FUEL COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY OF TALLAHASSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

FILED DECEMBER 10, 1900.

(17,990.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 505.

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vs.

THE CITY OF TALLAHASSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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1 Be it remembered that on the 26th day of June, A. D. 1900, at a regular term of the supreme court of the State of Florida, came the appellant, The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, by counsel, and filed in the clerk's office of the supreme court of Florida a transcript of the record of the proceedings and order of the circuit court of Florida for Leon county in a certain cause wherein The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, was complainant, and The City of Tallahassee, a municipal corporation of the State of Florida, was defendant, and of the appeal therein from the decree of the circuit court therein rendered: which said transcript of the record of the cause aforesaid and subsequent proceedings to decree and appeal therefrom is in the words and figures as follows, to wit:

Transcript of record of proceedings in the circuit court of Leon county, Florida, in the suit of The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, complainant, against The City of Tallahassee, a municipal corporation of the State of Florida, defendant.

On the 1st day of March, 1900, the complainant filed its bill of complaint against the defendant in words and figures following, to wit:

To the judge of the circuit court of the second judicial circuit of the State of Florida in and for Leon county, in chancery sitting:

The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, brings this its bill of complaint against the City of Tallahassee, a municipal corporation of the State of Florida.

2 And thereupon your orator complains and says:

That the Tallahassee Gas and Electric Light Company was duly and legally incorporated on the 20th day of December, A. D. 1887, under the general incorporation laws of the State of Florida then in force, and by such incorporation was vested with all the rights, privileges, and franchises conferred by the said general incorporation laws, as they then existed, upon companies incorporated thereunder; that the general nature of the business to be conducted by said corporation, as expressed in its articles of association, was to construct, maintain, and operate gas works and electric light works in the city of Tallahassee, in Leon county, Florida, and to manufacture gas for light and fuel, or to dispose of and deal in coal or wood for fuel, and to maintain and operate electric light machinery for supplying light in said city, or for manufacturing and dealing in any and all manner of artificial light or heat within the city. A copy of the articles of incorporation of said company is hereto attached, marked Exhibit A, and made a part hereof.

That after the incorporation of the said Tallahassee Gas and Elec-

tric Light Company, as aforesaid, the said company applied to the city of Tallahassee for the franchise of constructing gas and electric light wo-ks in the said city of Tallahassee for the purposes declared in its charter, and an ordinance was duly passed by the council of said city on the 4th day of January, A. D. 1888, which was approved the following day by the mayor of said city, giving and granting to said Tallahassee Gas and Electric Light Company the authority to construct gas and electric light works in said city, and for that purpose the right to lay its pipes in any and all the streets, alleys, and lots thereof, and to erect such lamp posts or poles or towers as might be necessary for furnishing gas or electric lights in said city,
3 and to that end to make such excavations or erect such structures, poles, or towers and run wires thereto along the streets of said city as might be necessary or essential.

That by said ordinance the said city of Tallahassee did obligate itself to take all gas which it might wish to consume in lighting its streets or buildings from said company at a price of not more than one dollar and fifty cents per thousand feet for such as might be used in public buildings used exclusively by said city, and at a price of not more than thirty dollars per annum for each street lamp of not less than twenty-candle power, and through burners of the capacity of four feet per hour for the period of twenty-five consecutive years from the completion of said gas works.

That by the terms of said ordinance it was also provided that said company should not be permitted to manufacture and supply gas for illuminating purposes of less than eighteen-candle power, and should not be permitted to charge private consumers for said gas at any time an amount exceeding two dollars and fifty cents per thousand feet, or to charge the city for gas lamps exceeding thirty dollars per annum for each lamp of not less than twenty-candle power through burners of a capacity of four feet per hour.

That it was further provided by said ordinance that the privileges and licenses therein and thereby granted should be exclusive in and to the Tallahassee Gas and Electric Light Company, their associates, successors, and assigns, for and during the term of twenty-five years.

That it was also provided by said ordinance that within thirty days after it went into effect the said Tallahassee Gas and Electric Light Company should file its written acceptance thereof in the office of the city clerk in the said city of Tallahassee; whereupon the same should become binding on both parties; and that the
4 construction of the said gas works should be commenced within thirty days after the filing of the said acceptance, and the said gas works should be completed and in practical operation within six months after the commencement of the construction thereof, and that the said company should put in and operate electric lights as soon as sufficient consumers can be secured to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and to put in practical operation the said electric lights. A copy of said ordinance is hereto attached, marked Exhibit B, and made a part hereof.

That the said Tallahassee Gas and Electric Light Company constructed its gas works under and in conformity to the terms and provisions of its charter and of the ordinance aforesaid, and began and continued the operation of the same by virtue and in pursuance thereof, and exercised and enjoyed, without violation, invasion, interference, infringement, or impairment, all and singular the powers, rights, privileges, licenses, and franchises granted to or conferred upon said company by the law of its incorporation and the ordinance of the city of Tallahassee aforesaid, including the contract for lighting the streets and buildings of said city at the price and on the terms provided in said ordinance, until on or about the 8th day of November, A. D. 1893, when all and singular the gas works, plant, and property of every kind and character of said company were taken possession of by a receiver appointed by the circuit court of the second judicial circuit of the State of Florida in and for Leon county, in chancery sitting, in a certain cause wherein William M. McIntosh, Jr., as trustee, was complainant and the said Tallahassee Gas and Electric Light Company was defendant.

That by virtue of a decree of foreclosure and sale made in said cause on the 4th day of January, A. D. 1894, all lands belonging to the said Tallahassee Gas and Electric Light Company, with the tenements, hereditaments, and appurtenances thereon and thereunto belonging or in anywise appertaining, and also the plant, machinery, and attachments thereto, whether movable or immovable, or whether pertaining to the realty or the personalty, and the corporate franchise of said company, and all classes of property, real, personal, and mixed, of said company, then owned by it, were offered for sale to the highest bidder on the 5th day of February, A. D. 1894, and, on being so offered, were bought by one William A. Rawls, and a deed was made to him therefor by the master in chancery in said cause, under the order and decree of said court.

That thereafter, to wit, on the 19th day of March, A. D. 1894, the Capital City Light and Fuel Company was duly incorporated under the general incorporation laws of the State of Florida; that the general nature of the business to be conducted by said corporation, as expressed in its articles of association, was to acquire, construct, improve, maintain, and operate gas works and electric light works in and adjacent to the city of Tallahassee, in Leon county, State of Florida; and to manufacture gas for light and fuel; to dispose of and deal in coal or wood for fuel; to construct, maintain, and operate electric light machinery for supplying light in and about the said city, or for manufacturing and dealing in any and all manner of artificial light or heat. A copy of the articles of incorporation of said company is hereto annexed, marked Exhibit C, and is made a part hereof.

That the said Capital City Light and Fuel Company was incorporated with the purpose and intent of acquiring and operating, under the terms and provisions of the said ordinance of the city of Tallahassee, the said property so purchased by the said William A. Rawls under the decree aforesaid, and the said property was purchased

by the said Rawls with the intent and purpose of transferring
6 it to said company for such purposes, and, in pursuance of such intent and purpose, the said property was made over by him to the said Capital City Light and Fuel Company, and the said company at once entered into the possession and assumed the management and control thereof, and continued the manufacture of gas for the purpose of supplying said city and its inhabitants with light and heat, and has since coming into possession thereof enlarged and extended its plant to meet the increased demands of said city and its inhabitants, and the said city has ever since recognized, treated, and dealt with the said Capital City Light and Fuel Company as the lawful successor to the said Tallahassee Gas and Electric Light Company and the legal assignee of all the rights, franchises, privileges, and contracts created and conferred on the said last-named company by the ordinance of the city of Tallahassee aforesaid.

That at the session of the legislature of the State of Florida held in the year 1899 an act was passed by said legislature, and approved by the governor of said State May 27th, 1899, entitled "An act to enable the city of Tallahassee to exercise the powers provided by chapter 4600 of the Laws of Florida, entitled 'An act to enable cities and towns to manufacture and distribute gas and electricity and to construct, purchase, lease and establish and maintain within its limits one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, as herein provided,' approved June 5th, 1897, and to declare the manner in which such city may exercise such powers."

That by section 2 of said act it was provided as follows:

"SEC. 2. That said city of Tallahassee may at any regular meeting of its city council, or at a special meeting duly called for such purpose, pass a resolution declaring that it is expedient for
7 such city to exercise the authority granted by section 1 of said act, approved June 5th, A. D. 1897; but a vote of a majority of such council shall be necessary to pass such resolution, and such resolution shall receive the approval of the mayor, or in case of his disapproving the same it shall be passed over his vote by a two-thirds vote of the council. Such resolutions shall provide for the submission to the registered voters of the city, residing therein and who own real estate therein and have paid their taxes for the year last due thereon, the question of the ratification of such resolution at a regular election or at a special election to be called and held for that purpose; and a majority of the votes cast at such election shall be necessary to such ratification; such election to be called and held and the electors registered and returns thereof made in the manner hereinafter provided for in case of an election upon the question of the issue of bonds. When the result of such election is against such ratification, no similar resolution shall be submitted for ratification until after the expiration of one year thereafter. A majority vote in favor of such ratification shall establish the right of the city to exercise the power to construct, purchase, lease and establish and maintain within its limits, one or more plants for the manufacture

and distribution of gas and electricity, or either, for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, as provided in section 1 of said chapter 4600 of the Laws of Florida."

That by section 3 of said act it is provided as follows:

"SEC. 3. If said city of Tallahassee shall vote to construct or purchase or lease, and to establish and maintain within its limits any such plant as above provided for, or for reconstructing and enlarging the same, as provided in the fifth section of said act, approved June 5, A. D. 1897, it may pay for the same by the issue of
8 bonds of the city payable within a term of not exceeding thirty years, and bearing interest at a rate not to exceed 5 per cent. per annum. Such bonds shall not be disposed of for less than par and accrued interest; and the indebtedness thereby created shall not be included in the limit of indebtedness of the said city now provided by law; but such bonds shall not be issued until an ordinance authorizing their issue shall have been adopted by the city or town council at a regular meeting or at a special meeting called for such purpose, which ordinance shall specify the purpose for which such bonds are to be issued, and the maximum amount of the issue, and the time of their maturity and the rate of interest and when and where the same shall be made payable: nor until such ordinance shall have been ratified by a majority of the vote of the registered voters of such city, voting at an election to be called for the purpose of taking the sense of such voters on such question and possessing the proper qualifications hereinbefore provided. The city council shall provide for the registration of such voters by a registration to be closed at least five days before such election, and for returns of election." * * *

That under and by virtue of the provisions of said act the council of said city of Tallahassee, on the 8th day of September, 1899, passed a resolution, which was approved by the mayor of said city, declaring it to be expedient for said city of Tallahassee to exercise the authority granted by the act of the legislature aforesaid to construct, purchase, establish, and maintain within the limits of said city a plant for the manufacture of electricity for furnishing lights for municipal use and for the use of such of its inhabitants as may require and pay for the same, such plant to include suitable land, structures, easements, water privileges, stations, boilers, engines,
dynamos, tools, machinery, pipes, conduits, hose, conductors,
9 burners, and other apparatus and appliances for making, generating, distributing, and using electricity for lighting purposes.

That the said council also, by virtue and under the authority of said act, passed an ordinance on the said 8th day of September, 1899, which was approved by the mayor of said city, providing for the issue of bonds by said city of Tallahassee for the purpose of establishing and maintaining an electric plant for municipal use and the use of its inhabitants, and providing for the submission of the question of the ratification of such ordinance to an election of the qualified voters of said city.

That an election was held by virtue of a proclamation of the mayor of the said city and the resolution and ordinance aforesaid upon the question of the ratification of said resolution and upon the question of the ratification of said ordinance by the qualified voters of said city on the 10th day of October, 1899, and both said resolution and said ordinance were ratified by such voters at such election.

That afterwards the said city of Tallahassee advertised for bids for the bonds to be issued under the provisions of said ordinance, and at the meeting of the council of said city, at which the bids for such bonds were to be received and opened, your orator, by its attorney, presented to the said council a written protest against the issue and sale of bonds by the said city for the purpose of establishing an electric lighting plant in said city, and stating that your orator is the lawful successor to the Tallahassee Gas and Electric Light Company, and the assignee of all the rights, privileges, and franchises which were granted to and conferred upon said company by an ordinance of the city of Tallahassee passed the 4th day of January, A. D. 1888, and approved by the mayor of said city the 5th day of said month, entitled An ordinance to grant certain privileges to the Tallahassee Gas and Electric Light Company, and that the construction of an electric lighting plant in said city by the municipality or other corporation or person would be an invasion and violation of the exclusive privileges conferred upon said Tallahassee Gas and Electric Light Company, and to which the Capital City Light and Fuel Company has succeeded. A copy of said protest is hereto annexed, marked Exhibit D, and is made a part hereof.

That notwithstanding said protest the said council accepted bids for the entire proposed issue of sixteen thousand dollars of bonds of said city.

That afterwards said city advertised for bids for putting in an electric plant for said city according to certain plans and specifications, which had been prepared at the instance of said city, and which plans contemplate a system for lighting the streets of said city and the residences and business houses of its inhabitants; that bids were received by said city pursuant to such advertisement from a number of different sources, and the said bids were opened and considered at a meeting of the council of said city held on Thursday, February 15th, 1900.

That at said meeting your orator, by its attorney, presented a written protest to said council against the said city of Tallahassee entering into a contract with any individual, firm, or corporation for putting in, erecting, or establishing an electric lighting plant in said city, as the construction of such plant by the municipality or other corporation or person would be an invasion and violation of the exclusive privileges conferred upon the said Tallahassee Gas and Electric Light Company by the said ordinance of January 4th, 1888, and to which the Capital City Light and Fuel Company has succeeded. A copy of such protest is hereto annexed, marked Exhibit E, and is made a part hereof.

That your orator is informed and believes, and thereupon
11 alleges, that the said city of Tallahassee, through its council, has provisionally accepted certain of said bids for furnishing and putting in such electric plant, but that absolute contracts have not yet been entered into by and between the said city and the corporation and persons whose bids were accepted for furnishing and installing such electric lighting apparatus and machinery, and that the bonds authorized to be issued and sold by said city for the purpose of establishing and maintaining an electric plant in said city have not yet been executed and delivered, but your orator is advised and believes, and thereupon alleges, that unless restrained by this honorable court the said city of Tallahassee will deliver said bonds and will enter into an absolute contract for furnishing, erecting, and installing an electric lighting plant in said city, and that it is the purpose and intention of said city, if such plant is installed, not only to use the same for the purpose of lighting its streets and public buildings, but also for furnishing lights to its inhabitants for lighting their residences and places of business for compensation.

That your orator is advised and believes, and thereupon charges, that the law under which the Tallahassee Gas and Electric Light Company was incorporated and the ordinance of the city of Tallahassee passed January 4th, 1888, aforesaid, conferred upon the said company and its successors and assigns the exclusive privilege and franchise of lighting said city by gas or electricity and of using the streets of said city for that purpose for the period of twenty-five years from the time of the completion of its gas works; that the said Capital City Light and Fuel Company is the lawful successor to said Tallahassee Gas and Electric Light Company and the lawful assignee of all its rights, privileges, and franchises, and, among them, the exclusive privilege and franchise of lighting said city by gas or
12 electricity and of using the streets of said city for that purpose, and that the said city of Tallahasse cannot lawfully invade, infringe, impair, or violate the said privileges and franchises during the said term of twenty-five years by installing or establishing an electric lighting plant of its own to come into competition with your orator in such lighting business.

That at the time of the passage of the said ordinance of January 4th, 1888, the said city of Tallahassee had notice of the objects and purposes for which the Tallahassee Gas and Electric Light Company was incorporated, as declared in its charter, and of the powers, privileges, and franchises which were conferred upon it by the law of its being; and at the time of the passage of said ordinance the power of the city of Tallahassee with respect to public lighting was confined, under the law of its being, which was and is the act approved February 4, 1869, entitled "An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this State," and the amendments thereof, to lighting the streets of said city, and did not extend to furnishing for pay lights for the use of its inhabitants in their residences and places of business; that the said Tallahassee Gas and Electric Light Company, relying upon the rights, privileges and franchises conferred

upon it by the law of its organization, and the ordinance of said city of Tallahassee of January 4th, 1888, and the exclusive nature of the same, and the powers of said city under its charter, was induced to invest a large amount of money in its gas plant for the purpose of furnishing said city with gas for street lighting and for the use of its inhabitants for light and heat in their residences and places of business, and your orator charges that a contract was thereby created between the said company and the said city, the obligation of which cannot be violated by subsequent legislation.

That the said Capital City Light and Fuel Company, relying on such grants to the said Tallahassee Gas and Electric Light Company, and the exclusive exercise thereof by said company from the time of the completion of its works up to the time the same were taken in charge by a receiver of this court, as hereinbefore alleged, and the contract thereby created and existing between the said city and the said company and its successors and assigns, invested large sums of money in purchasing said plant and works and in enlarging and extending the same to meet the increased demands of the said city and its inhabitants, and by reason of the increased number of lights taken by said city after the acquisition of said gas works by the Capital City Light and Fuel Company the said company decreased the price for street lighting to twenty-five dollars per annum for each lamp, and the said city has continued uninterruptedly from the installation of said gas plant to the present time to take gas from said companies respectively for lighting its streets and municipal buildings.

13

That your orator is informed and believes, and thereupon alleges, that the population of said city of Tallahassee is about four thousand, and that a large proportion of it is of a class that is financially unable to use either gas or electricity for domestic lighting, and for such reasons the said city of Tallahassee is incapable of sustaining two lighting systems.

That, from the best of your orator's knowledge, information, and belief, there has never been a time since the establishment of said gas works in said city that your orator or its predecessor could have procured sufficient consumers to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and to put into practical operation an electric lighting system in said city.

That your orator is informed and believes, and thereupon alleges, that the establishment of an electric lighting plant by said city in competition with the gas plant of your orator will be destructive of the value of your orator's lighting plant and an invasion, impairment, and violation of its rights and franchises hereinbefore set out and declared and a violation of the obligation of the contract made and entered into between the said city of Tallahassee and the Tallahassee Gas and Electric Light Company and its successors and assigns.

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That the alleged wrong and injury, if permitted, will be destructive of the property of your orator in the character in which it has been

enjoyed and will cause your orator irreparable injury, and your orator has no adequate remedy in a court of law.

To the end, therefore, that the said defendant, The City of Tallahassee, may, under its corporate seal, full, true, direct, and perfect answer make to all and singular the premises as fully and particularly as if the same were here repeated and the said defendant specially interrogated thereto;

And that the said city of Tallahassee, its officers, agents, and servants, may be enjoined from issuing and disposing of the said sixteen thousand dollars of bonds of said city, or any of them, which were authorized to be issued by the ordinance entitled An ordinance providing for the issue of bonds by the city of Tallahassee for the purpose of establishing and maintaining an electric plant for municipal use and the use of its inhabitants, and providing for the submission of the question of the ratification of such ordinance to an election of the qualified voters of said city, approved September 11th, 1899, and the election held thereunder on the 10th day of October, 1899, and from delivering the said bonds or any of them to the person or persons, corporation or corporations, whose bids therefor have been received and accepted by the council of said city, or to any other person or persons, corporation or corporations;

And that the said city of Tallahassee, its officers, agents and servants, may be enjoined from establishing and maintaining an electric plant for the manufacture of electricity for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, and from furnishing electric lights to the inhabitants of said city for lighting their residences and places of business for the balance of the period of twenty-five years for which the exclusive franchise of constructing gas and electric works in said city, and using the streets thereof for that purpose, and furnishing gas and electric lights for said city and its inhabitants, was granted, to wit, until the — day of ——, A. D. 1913;

And that the said city of Tallahassee, its officers, agents and servants, may be enjoined from making or entering into any contract or contracts, or from performing any contract or contracts already made, with any corporation, person, or firm for furnishing electric apparatus and other machinery for an electric lighting plant to be installed in said city, and from making or entering into any contract or contracts, or from performing any contract or contracts already made with any person, firm, or corporation for installing an electric lighting plant in said city during the period aforesaid;

And that your orator may have such further or other relief in the premises as the nature of the circumstances of the case may require and to your honor shall seem meet.

May it please your honor to grant unto your orator, not only the writ of injunction as hereinbefore prayed, but also a writ of subpœna, to be directed to the said defendant, The city of Tallahassee, thereby commanding it, at a certain time and under a certain penalty therein to be limited, to appear before this honorable court and

then and there full, true, direct, and perfect answer make to
16 all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

And your orator will ever pray, &c.

FRED. T. MYERS,
Solicitor for the Complainant.

STATE OF FLORIDA, }
County of Leon. }

Before me, Council A. Bryan, clerk of the circuit court in and for the county and State aforesaid, personally appeared C. A. Spencer, who on oath says that he is the superintendent of The Capital City Light and Fuel Company, the complainant in the foregoing bill of complaint, and that the matters and things in the said bill set forth are true, except such as are therein alleged to be on information and belief, and those he believes to be true.

C. A. SPENCER.

Sworn to and subscribed before me this the 28th day of February, A. D. 1900.

COUNCIL A. BRYAN,
Clerk Ct. Ct., L. C., Florida.

EXHIBIT A.

Articles of Association.

Tallahassee Gas and Electric Light Company.

Know all men by these presents that we, the undersigned, Edward S. Crill, Wm. M. McIntosh, Jr., and Charles Monroe, all of the State of Florida, do hereby associate ourselves into a company or association to be known and designated as the—

1st. Tallahassee Gas and Electric Light Company, and in
17 such name to sue and be sued, hold, lease, buy, sell, mortgage, and otherwise dispose of all such realty and personalty as may be necessary for the purposes hereinafter explained.

2nd. The object and purposes of this association *is* to construct, maintain, and operate gas works and electric light works in the city of Tallahassee, in Leon county, Florida, and to manufacture gas for light and fuel, or to dispose of and deal in coal or wood for fuel, and to maintain and operate electric light machinery, for supplying lights in said city or for manufacturing and dealing in any and all manner of artificial light or heat within said city.

3d. The duration of said association shall be for the term of twenty-five years.

4th. The capital stock of said company shall be fifty thousand dollars, to be divided into five hundred shares of stock of one hundred dollars each.

5th. The amount of indebtedness which may at any time be created shall never exceed the amount of capital stock.

6th. The principal place of business shall be in Tallahassee, Florida.

7th. The capital shall be paid in as may be required by law and the by-laws hereafter to be adopted by the association.

8th. The business of the company shall be conducted by a board of not less than three or more than five directors, one of whom shall be made president, and then officers shall be elected annually.

There shall be such subordinate officers as may be hereafter determined upon.

In testimony whereof we have hereunto set our hands this December 20th, A. D. 1887.

EDWARD S. CRILL.
W. M. McINTOSH, JR.
CHAS. MUNROE.

18 Filed in office secretary of state December 20th, 1887.

STATE OF FLORIDA, } ss:
Office Secretary of State, }

I, Jno. L. Crawford, secretary of state of the State of Florida, do hereby certify that the foregoing is a true and correct copy of the articles of association of the Tallahassee Gas and Electric Light Company as filed in this office.

Given under my hand and the great seal of the State of Florida, at Tallahassee, the capital, this the 24th day of February, A. D. 1900.

[SEAL.] JNO. L. CRAWFORD,
Secretary of State.

Cancelled U. S. rev. 10-cts. stamp attached.

EXHIBIT B.

An ordinance entitled An ordinance to grant certain privileges to the Tallahassee Gas and Electric Light Company.

Be it ordained by the city council of the city of Tallahassee:

SECTION 1. That the Tallahassee Gas and Electric Light Company be and they are hereby authorized to construct gas and electric light works in the city of Tallahassee, and for that purpose that the said company shall have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same, and to erect such lamp posts or poles or towers, as may be necessary or essential for furnishing gas or electric lights in said city of Tallahassee, and to this end the Tallahassee Gas and Electric Light Company are authorized to make such excavations or erect such structures, poles or towers, and run wires thereto along the streets
19 of said city as may be necessary or essential: Provided, that in laying such pipes or erecting such lamp posts, or poles or towers, the said company shall not obstruct any street for a longer period than twelve hours.

SEC. 2. That the said company shall, whenever it shall make any

excavation in any street or shall have any material in any street, place lights to a sufficient number upon such excavations and material to warn all persons from such excavations and material at night.

SEC. 3. That the said company in constructing its works upon any street in the city of Tallahassee, shall first submit to the street committee the streets upon which pipes are to be laid, and shall abide any order of the street committee made therein governing the manner and time in which said pipes shall be laid.

SEC. 4. That the said company in accepting this ordinance shall become liable to any and all damages accruing to private individuals by reason of the construction of such works or which may arise from negligence of said company or its employees and shall hold the city harmless against any damages which may arise as hereinbefore mentioned.

SEC. 5. That the said company shall not obstruct by placing material or making excavations for their pipes in any more of the streets of the city at any one time than will be necessary for the carrying on of its work, and the said company shall, as soon as practicable, remove any and all obstructions from the streets and place the streets in as near the same condition as they were prior to excavations as is possible, and in constructing said works, the said company shall follow established grades of the streets, and the city surveyor is required to furnish the grade at the expense of the company, when requested by said company to do so.

SEC. 6. The said company shall not be permitted to manufacture and supply gas for illuminating purposes of less than eighteen (18) candle power, and shall not be permitted to charge private consumers for said gas at any time an amount exceeding two and one-half dollars per one thousand feet, and the charge to the city for gas lamps shall not exceed thirty dollars per annum for each lamp of not less than twenty-candle power, through burners of a capacity of four feet per hour.

SEC. 7. That within thirty days after the day that this ordinance takes effect, the said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, shall file their written acceptance thereof in the office of the city clerk in the said city of Tallahassee, whereupon the same shall become binding on both parties. The construction of the said gas works shall be commenced within thirty days after the filing of said acceptance and said gas works shall be completed and in practical operation within six months after the commencement of the construction thereof, and the said Tallahassee Gas and Electric Light Company shall put in and operate electric lights as soon as sufficient consumers can be secured to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights.

SEC. 8. That if the said company shall fail to complete the said gas works within the time prescribed in the foregoing section of this ordinance, or shall fail to furnish gas at any time for the space of six months, or shall violate any of the provisions of this ordi-

nance, the city council of the said city of Tallahassee may in its discretion declare this ordinance null and void and may repeal the same.

SEC. 9. That the said city of Tallahassee do hereby lease and rent to said Tallahassee Gas and Electric Light Company, and its successors and assigns, at an annual rental of one dollar per year for the term of ninety-nine (99) years, payable by said company or its successors, on the first day of each year, three (3) acres of land
21 adjoining the land now occupied by the Tallahassee Ice Company and adjoining the right of way of the Florida Railway and Navigation Company's line of road, said land to be selected and surveyed by said Tallahassee Gas and Electric Light Company; said land to be used for the plant and for such other purposes as may be required by said company for the transaction of their business. As soon as said Tallahassee Gas and Electric Light Company shall have selected and surveyed said three (3) acres of land, the mayor and city clerk of said city, shall execute under the seal of said city, and deliver to said Tallahassee Gas and Electric Light Company a lease in proper form of such three (3) acres of land with a particular description thereof according to said selection and survey and according to the terms hereof.

SEC. 10. That the said city of Tallahassee, in consideration of the foregoing requirements being complied with on the part of the said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, shall and hereby obligates itself to take all gas which it may wish to use in lighting its streets or buildings from said company at a price of not more than one and one-half dollars ($1.50) per one thousand feet for such as may be used in public buildings used exclusively by said city, and at a price of not more than ($30) thirty dollars per annum for each street lamp as hereinbefore provided for in section six of this ordinance, for the period of twenty-five consecutive years from the completion of said gas works: Provided, that nothing herein shall be construed as an obligation on the part of the said city of Tallahassee to take any gas from said company.

SEC. 11. That the privileges and licenses herein and hereby granted shall be exclusive in and to said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, for and during the term of twenty-five years.

SEC. 12. All ordinances and parts of ordinances in conflict
22 with this ordinance be and the same are hereby repealed.

Passed by the council in due and proper manner at a regular meeting held on the 4th day of January, A. D. 1888.

T. H. RANDOLPH,
President City Council.

Attest: J. L. DEMILLY, *City Clerk.*

Approved January 5, 1888.
A. J. FISH, *Mayor.*

Exhibit C.

Letters Patent, State of Florida.

To all — whom these presents shall come, Greeting:

Whereas W. M. McIntosh, Jr., W. A. Rawls, and Dougald Maclachlan, on the 20th day of February, A. D. 1894, filed in the office of the secretary of state a proposed charter of a corporation, to be known as the Capital City Light and Fuel Company, with a capital of thirty thousand ($30,000.00) dollars, for the purpose of acquiring, constructing, improving, maintaining, and operating gas works in and adjacent to the city of Tallahassee, in Leon county, State of Florida, and to manufacture gas for light and fuel, to dispose of and deal in coal or wood for fuel, to construct, maintain, and operate electric light machinery for supplying lights in and about said city, or for manufacturing and dealing in any and all manner of artificial light or heat within or adjacent to said city, and have published due notice thereof, and have otherwise complied with the statute in such case made and provided:

23 Therefore the State of Florida hereby incorporates the above-named persons, their associates and successors, into a body politic and corporate in deed and in law by and under the said name of the Capital City Light and Fuel Company, and grants unto them full authority to exercise the powers and privileges of a corporation for the purpose above stated, in accordance with their said charter and the laws of this State.

In witness whereof these presents have been attested with the great seal and signed and countersigned by the governor and [SEAL.] secretary of state of the State of Florida, at Tallahassee, the 19th day of March, A. D. 1894.

H. L. MITCHELL, *Governor.*

JNO. L. CRAWFORD,
Secretary of State.

Notice of Intention to Apply for Letters Patent.

Notice is hereby given of the intention of the undersigned to apply to his excellency H. L. Mitchell, governor of the State of Florida, for letters patent on the following proposed articles of incorporation for the Capital City Light and Fuel Company of Tallahassee, Florida, in pursuance of section 2125 of the Revised Statutes of Florida and amendments thereto.

Dated Tallahassee, Florida, February 20th, 1894.

W. M. McINTOSH, Jr.
W. A. RAWLS.
DOUGALD MacLACHLAN.

24 *Proposed Articles of Incorporation of the Capital City Light and Fuel Company.*

The undersigned do hereby propose to associate themselves together for the purpose of being incorporated and becoming a body corporate under and by virtue of the laws of Florida and adopt the following as the proposed charter:

Article I. The name of this corporation shall be the Capital City Light and Fuel Company, its place of business in the city of Tallahassee, State of Florida.

Article II. The general nature of the business to be transacted by said corporation shall be to acquire, construct, improve, maintain and operate gas works and electric light works in and adjacent to the city of Tallahassee, in Leon county, State of Florida, and to manufacture gas for light and fuel, to dispose of and deal in coal or wood for fuel, to construct, maintain and operate electric light machinery for supplying lights in and about said city, or for manufacturing and dealing in any and all manner of artificial light or heat within or adjacent to said city.

Article III. The amount of the capital stock shall be thirty thousand dollars, to be divided into three hundred shares of $100.00 each. And said capital stock is to be fully paid stock, by the conveyance to said corporation of all the estate, right, title and interest, real, personal and mixed of the owners thereof, free and unincumbered of in and to the gas works, as now situate on the leasehold premises adjacent to the city of Tallahassee, with a transfer of said lease and all appurtenances thereto belonging, together with the main and lateral pipes, lamps, lamp posts, meters, houses and buildings. The same constituting the outfit and plant of a complete gas works, and the assignment and transfer thereto of the corpo-
25 rate franchise with all rights contractual or otherwise thereunder formerly of the Tallahassee Gas and Electric Light Company, acquired by foreclosure sale from said company.

Article IV. The term of this corporation shall begin with the issue of letters patent and continue for ninety-nine years.

Article V. The business of this corporation shall be conducted by a president, a secretary, a treasurer, and a board of three directors. The stockholders at the first meeting in February, A. D. 1894, and annually thereafter, shall elect a president and secretary, treasurer, and a board of three directors. Until the first annual election, the business of this corporation shall be conducted by William M. McIntosh, Jr., president, and William A. Rawls, secretary and treasurer, and by said officers and D. Maclachlan, as directors.

Article VI. The highest amount of indebtedness or liability to which this corporation may subject itself shall be thirty thousand dollars.

Article VII. The subscribers to stock in this corporation are: W. M. McIntosh, Jr., Tallahassee, Fla., W. A. Rawls, Tallahassee, Fla., Dougald MacLachlan, Tallahassee, Fla.

STATE OF FLORIDA, }
County of Leon. }

Personally came before me, a notary public in and for said State and county, William M. McIntosh, Jr., William A. Rawls, and Dougald MacLachlan, who each for himself acknowledges that he is a subscriber to the capital stock of the Capital City Light and Fuel Company, and that each subscribed his name to the foregoing proposed charter of the Capital City Light and Fuel Company, as therein appears.

In witness whereof I have hereunto set my hand and affixed my official seal this 20th day of February, A. D. 1894, at Tallahassee, Florida.

[L. S.] W. M. McINTOSH,
Notary Public.

26 TALLAHASSEE, FLORIDA, *March 19th*, 1894.

I, William A. Rawls, treasurer of the Capital City Light and Fuel Company, of the city of Tallahassee, Florida, do hereby certify that more than ten (10) per cent., to wit, one hundred (100) per cent., of the capital stock of said company has been subscribed and fully paid in accordance with the articles of incorporation of said company and in compliance with the laws of the State of Florida.

W. A. RAWLS.

Sworn to and subscribed before me this 19th day of March, 1894.

[L. S.] W. M. McINTOSH,
Notary Public.

STATE OF FLORIDA, }
Office Secretary of State, } *ss:*

I, Jno. L. Crawford, secretary of state of the State of Florida, do hereby certify that the foregoing is a true and correct copy of the charter of the Capital City Light & Fuel Company as of file and recorded in this office in Book "C" of Articles of Incorporation on pages 310, 311, & 312.

Given under my hand and the great seal of the State of Florida, at Tallahassee, the capital, this the 24th day of February, A. D. 1900.

[L. S.] JNO. L. CRAWFORD,
Secretary of State.

Cancelled U. S. rev. 10 cts. stamp attached.

EXHIBIT D.

NOV. 21ST, 1899.

27 Hon. Frank W. Armstrong, president of the council of the city of Tallahassee, Fla.

SIR: The Capital City Light and Fuel Company hereby respectfully but firmly protests against the issue and sale of bonds by the city of Tallahassee for the purpose of establishing an electric light-

ing plant in said city. This company is the lawful successor of the Tallahassee Gas and Electric Light Company and the assignee of all the rights, privileges, and franchises granted to and conferred upon said company by an ordinance of the city of Tallahassee the 4th day of January, 1888, and approved by its mayor the 5th day of said month, entitled An ordinance to grant certain privileges to the Tallahassee Gas and Electric Light Company.

The construction of an electric lighting plant in said city by the municipality or other person or corporation would be an invasion and violation of the exclusive privileges conferred upon said Tallahassee Gas and Electric Light Company, and to which the Capital City Light and Fuel Company has succeeded.

This company therefore takes this means of putting the council of said city and any intending purchaser of said bonds on notice of the claim of said company and of its intentions to take the necessary steps to protect its interests under said ordinance in case of any attempted invasion of the franchises and privileges thereby granted.

We therefore respectfully request that you lay this protest before the council of which you are the president, and have the same entered in the minutes. We have the honor to be,

Very respectfully,

CAPITAL CITY LIGHT AND FUEL CO.,
By FRED. T. MYERS, *Their Attorney.*

28 EXHIBIT E.

FEB. 15, 1900.

Hon. Frank W. Armstrong, president of the council of the city of Tallahassee, Fla.

SIR: The Capital City Light and Fuel Company hereby respectfully but firmly protests against the city of Tallahassee entering into a contract with any individual, firm, or corporation for putting in, erecting, or establishing an electric lighting plant in said city.

This company is the lawful successor of the Tallahassee Gas and Electric Light Company and the assignee of all the rights, privileges, and franchises granted to and conferred upon said company by an ordinance of the city of Tallahassee passed January 4th, 1888, and approved by its mayor January 5th, 1888, entitled An ordinance to grant certain privileges to the Tallahassee Gas and Electric Light Company.

The construction of an electric lighting plant in this city by the municipality or other corporation or person would be an invasion and violation of the exclusive privileges conferred upon said Tallahassee Gas and Electric Light Company by said ordinances, and to which the Capital City Light and Fuel Company has succeeded.

This company therefore takes this means of putting the council of said city and any intending contractor on notice of the claims of said company and of its intention to take the necessary steps to protect its interests under said ordinance in case of an attempted invasion of the franchises and privileges thereby granted.

We therefore respectfully request that you lay this protest before

the council of which you are the president, and have the same entered on the minutes. We have the honor to be,

Very respectfully,

CAPITAL CITY LIGHT AND FUEL CO.,
By FRED. T. MYERS, *Attorney.*

29 On the 1st day of March, 1900, subpœna in chancery issued.

On the 1st day of March, 1900, service of subpœna was made on defendants.

On the 23rd day of March, 1900, the defendant filed the following demurrer to the bill of complaint:

Circuit Court, Second Judicial Circuit of Florida, in and for Leon County.

THE CAPITAL CITY LIGHT & FUEL COMPANY, a Corporation under the Laws of the State of Florida, Complainant,
vs.
THE CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Defendant.

The demurrer of The City of Tallahassee, a municipal corporation of the State of Florida, to the bill of complaint of The Capital City Light & Fuel Company, the complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill and for cause of demurrer showeth that the plaintiff hath not in and by its said bill stated such a case as entitles it in a court of equity to any discovery from this defendant or to any relief against the defendant as to the matters contained in said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in said bill, the defendant doth demur thereto and humbly demands the judgment of this court whether it shall by compelled
30 to make any further or other answer to said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

THE CITY OF TALLAHASSEE,
[SEAL.] By R. B. GORMAN, *Mayor.*

Attest:
A. H. WILLIAMS, *City Clerk.*
GEO. P. RANEY,
City Attorney and of Counsel.

I hereby certify that the above demurrer is in my opinion well founded in point of law.

GEO. P. RANEY, *Of Counsel.*

STATE OF FLORIDA, }
Leon County. }

Robert B. Gorman, being duly sworn, deposes and says he is the mayor of The City of Tallahassee, the defendant above named, and that the above demurrer is not interposed for delay.

R. B. GORMAN.

Sworn to and subscribed before me this 23rd day of March, 1900.

COUNCIL A. BRYAN,
Clerk Circuit Court, Leon County, Florida,
By N. E. BASSETT, *D. C.*

On the 15th day of May, 1900, the final decree was made and entered in said cause in the words and figures as follows:

31 Circuit Court, Second Judicial Circuit of the State of Florida, in and for Leon County. In Chancery.

THE CAPITAL CITY LIGHT AND FUEL COMPANY, a Corporation under the Laws of the State of Florida, Complainant,
vs.
THE CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Defendant.

This cause coming on to be heard on the 24th day of March of the present year upon the application of the complainant for a temporary injunction according to the prayer of the bill of complaint, and also upon the defendant's demurrer to the bill of complaint, the absence of the previous setting down of such demurrer for argument and of formal notice of such hearing being waived, was argued orally by the respective counsel of the complainant and defendant, and subsequently such counsel filed written briefs, and the court being now advised of its judgment in the premises, it is hereupon ordered, adjudged, and decreed that the complainant's application for an injunction be, and the same is, denied, and that the defendant's demurrer be, and is hereby, sustained, and that the bill of complaint be, and is hereby, dismissed at the cost of the complainant, which costs will be taxed by the clerk.

Done, adjudged, and decreed this 15th day of May, A. D. 1900, at Tallahassee, Leon county, Florida.

JOHN W. MALONE, *Judge.*

32 On the 6th day of June, 1900, the complainant, by its attorney, filed and entered its appeal from the final decree entered in this cause on the 15th day of May, 1900, and its notice to defendant in the words and figures following:

In the Circuit Court, Second Judicial Circuit of Florida, in and for Leon County. In Chancery.

THE CAPITAL CITY LIGHT AND FUEL COMPANY, a Corporation under the Laws of the State of Florida, Complainant,
vs.
THE CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Defendant.

Now, on this 6th day of June, A. D. 1900, comes the complainant, The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, and enters its appeal to the supreme court of the State of Florida from the decree entered in this cause on the 15th day of May, A. D. 1900, denying complainant's application for an injunction and sustaining defendant's demurrer to complainant's bill and dismissing said bill, and this appeal is hereby made returnable the 9th day of July, A. D. 1900, being a day in the June term, A. D. 1900, of said supreme court, which is more than thirty and not more than fifty days from the date of the entry of this appeal; and notice is hereby given to the defendant, The City of Tallahassee, of this appeal.

FRED. T. MYERS,
Attorney for the Complainant.

June 6th, 1900.

33 STATE OF FLORIDA, }
County of Leon. }

I, Council A. Bryan, clerk of the circuit court in and for said county, do hereby certify that the foregoing entry and notice of appeal was filed in my office on the 6th day of June, A. D. 1900, and on the same day was duly entered in the Chancery Order Book of said court, at page 493.

In testimony whereof I have hereunto set my hand and the seal of said court on this the 6th day of June, A. D. 1900.

[SEAL.] COUNCIL A. BRYAN, *Clerk.*

On the 6th day of June, 1900, complainant filed its assignment of errors in the words and figures as follows:

On Appeal to the Supreme Court from the Circuit Court of the Second Judicial Circuit of the State of Florida in and for Leon County. In Chancery.

THE CAPITAL CITY LIGHT AND FUEL COMPANY, a Corporation under the Laws of the State of Florida, Complainant and Appellant,
vs.
THE CITY OF TALLAHASSEE, a Muncipal Corporation of the State of Florida, Defendant and Appellee.

34 The complainant in this cause having duly entered its appeal to the supreme court of the State of Florida from the decree rendered by the circuit court herein on the 15th day

of May, A. D. 1900, assigns as error the rendering of said decree of May 15th, A. D. 1900, by the circuit court, wherein and whereby complainant's application for an injunction was denied, defendant's demurrer to complainant's bill sustained, and complainant's bill dismissed.

FRED. T. MYERS,
Attorney for Complainant and Appellant.

June 6th, 1900.

Copy of the above assignment of errors served on me by complainant's counsel June 6th, 1900.

GEO. P. RANEY,
Attorney for Defendant and Appellee.

On the 6th day of June, 1900, complainant filed its instructions to the clerk of the circuit court for making up transcript of record, in words and figures as follows:

In the Circuit Court, Second Judicial Circuit of Florida, in and for Leon County. In Chancery.

THE CAPITAL CITY LIGHT AND FUEL COMPANY, a Corporation under the Laws of the State of Florida, Complainant,
vs.
THE CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Defendant.

To the clerk of said court:

You are hereby directed to commence the making up of the
35 certified transcript of the record of this cause, to be used on appeal on the 22nd day of June, 1900; and you are instructed on the part of the appellant to copy and make a part of said record (1) the bill of complaint, with exhibits thereto, (2) the demurrer to the bill, (3) the final decree rendered May 15th, 1900, (4) the entry of appeal made June 6th, 1900, (5) the assignment of errors, filed June 6th, 1900, and (6) these instructions; and you will simply recite the issuing and service of subpœna.

FRED. T. MYERS,
Attorney for Complainant and Appellant.

June 6th, 1900.

Copy of above instructions received by me this June 6th, 1900.

GEO. P. RANEY,
Attorney for Defendant and Appellee.

STATE OF FLORIDA,
County of Leon.

I, Council A. Bryan, clerk of the circuit court in and for the county of Leon, State of Florida, do hereby certify that the foregoing pages, numbered from one to thirty-eight, inclusive, contains a correct transcript of the record of the judgment in the case of The Capital City Light and Fuel Company, a corporation under the laws of

the State of Florida, plaintiff, against The City of Tallahassee, a municipal corporation of the State of Florida, defendant, and a true and correct recital and copy of all such papers and proceedings in said cause, as appears upon the records and files in my office, that have been directed to be included in said transcript by the written demands of the said parties.

36 In testimony whereof I have hereunto set my hand and affixed the seal of said court this 26th day of June, A. D. 1900.

[SEAL.] COUNCIL A. BRYAN,
Clerk of the Circuit Court for the County of Leon.

Whereupon came the parties, both appellant and appellee, in the said cause, by their respective counsel, and submitted their cause to the said supreme court upon the said transcript of the record and written arguments.

And at a subsequent day, to wit, on the 10th day of October, A. D. 1900, judgment was rendered by the said supreme court of the State of Florida in words and figures as follows, to wit:

THE CAPITAL CITY LIGHT AND FUEL Company, a Corporation under the Laws of Florida, Appellant,
vs.
THE CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Appellee.

Upon Appeal from a Decree of the Circuit Court within and for the County of Leon.

This cause having been submitted to the court at a previous day of this term upon a transcript of the record of the decree aforesaid and the argument of counsel for the respective parties, and the

37 record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be, and is, affirmed; and it is further ordered that the appellant do pay the costs of this proceeding, which costs amount to the sum of —; all of which is ordered to be certified to the court below.

R. F. TAYLOR,
Chief Justice.

And afterwards, to wit, 9th day of November, A. D. 1900, came the appellant, The Capital City Light and Fuel Company, by counsel, and filed in open court before the chief justice their petition for the allowance of a writ of error to said judgment, returnable to the Supreme Court of the United States, according to the rules of said court, the acts of Congress, and the Constitution of the United States in such cases made and provided; which petition was in the words and figures as follows, to wit:

In the Supreme Court of the State of Florida.

CAPITAL CITY LIGHT AND FUEL COMPANY, a Corporation under the Laws of the State of Florida, Appellant,
vs.
CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Appellee.

38 To the Honorable R. F. Taylor, chief justice of the supreme court of the State of Florida:

The petition of The Capital City Light and Fuel Company, the appellant in the above-entitled cause, showeth that a final decree was rendered by the said supreme court of the State of Florida in the above-stated cause on the 10th day of October, A. D. 1900, wherein was drawn in question the validity of a statute of or authority exercised under the said State of Florida, on the ground of their being repugnant to the Constitution of the United States, namely, the validity of a statute of said State approved May 27th, 1899, and entitled "An act to enable the city of Tallahassee to exercise the powers provided by chapter 4600 of the Laws of Florida, entitled 'An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease, and establish and maintain within its limits one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided,' approved June 5th, 1897, and to declare the manner in which such city may exercise such powers," and the validity of an ordinance of the said city of Tallahassee passed under authority of the said statute and approved September 11th, 1899, and entitled "An ordinance providing for the issue of bonds by the city of Tallahassee for the purpose of establishing and maintaining and electric light plant for municipal use and the use of its inhabitants, and providing for the submission of the question of the ratification of such ordinance to an election of the qualified voters of said city;" which statute and ordinance, it was contended by appellant, were repugnant to the Constitution of the United States, in that they violated the obligation of a contract which conferred upon appellant the exclusive
39 privilege of operating gas and electric light works in the said city of Tallahassee, and the decision of said court was in favor of the validity of the said statute and of the said ordinance, all of which appears of record in the said supreme court of the State of Florida.

Your petitioner therefore prays your honor to allow a writ of error to the appellant in the above-stated cause, returnable to the Supreme Court of the United States, according to the rules of said court, the acts of Congress, and the Constitution of the United States in such cases made and provided; and your petitioner will ever pray, &c.

FRED. T. MYERS,
Attorney for the Appellant.

Whereupon, on the same day, the prayer of the petitioner was granted by an order in words and figures as follows, to wit:

Upon reading and considering the foregoing petition, and it appearing that the said cause is one in which the appellant is entitled to a writ of error under the Constitution of the United States and the acts of Congress, the writ of error prayed for is hereby allowed.

Done this 9th day of November, 1900.

R. F. TAYLOR,
Chief Justice Sup. Ct. of Fla.

40 And thereafter, upon the same day, upon the presentation to the chief justice of said petition for the allowance of a writ of error, the same was allowed by the chief justice, as appears upon the original writ of error as accompanying this return, and upon the 22nd day of November, A. D. 1900, a citation was allowed by the chief justice, as appears upon the original citation accompanying this return and the writ of error aforesaid.

And thereafter, to wit, on the 23rd day of November, A. D. 1900, and during the term of the said court, the original bond of the plaintiff in error in this writ of error, approved by the Hon. R. F. Taylor, chief justice of the supreme court of the State of Florida, was filed in words and figures as follows, to wit:

Know all men by these presents that we, The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, as principal, and the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co., G. W. Saxon, Julius Diamond, and The West End Trust and Safe Deposit Co., as sureties, are held and firmly bound unto the City of Tallahassee, a municipal corporation of the State of Florida, in the full and just sum of twenty-five hundred dollars, to be paid to the said City of Tallahassee, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 23rd day of November, in the year of our Lord nineteen hundred.

Whereas lately, at a term of the supreme court of the
41 State of Florida, in a cause pending in said court between The Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, appellant, and The City of Tallahassee, a municipal corporation of the State of Florida, appellee, a final judgment was rendered by said court against the said appellant on the tenth day of October, in the year of our Lord nineteen hundred; and whereas the chief justice of the supreme court of the State of Florida has, at the suit of the said appellant, allowed a writ of error to the Supreme Court of the United States to review the judgment aforesaid of the said supreme court of the State of Florida:

Now, therefore, the condition of the above obligation is such that if the said Capital City Light and Fuel Company shall prosecute said writ to effect and shall answer all damages and costs that may be awarded against said company if it fails to make good its plea,

then the above obligation to be void; otherwise to remain in full force and virtue.

CAPITAL CITY LIGHT & FUEL CO.,
By JOS. S. KEEN, JR., *President.*

[Corporate Seal of Capital City Light & Fuel Co.]

Attest: H. BAYARD HODGE, *Sec'y.*
G. W. SAXON. [SEAL.]
JULIUS DIAMOND. [SEAL.]
JNO. K. CUMING, *Pre'd't.*

[Seal of Columbia Ave. Sav. Fund, Safe Dep., Title & Trust Co.]

Attest: WALTER SCOTT, *Sec'y.*
THE WEST END TRUST AND SAFE DEPOSIT CO.,
By HORACE A. DOAN, *Pres't.*

[Seal of West End Trust and Safe Dep. Co.]

Attest: CHAS. E. WOLBERT, *Sec.*

[50c. documentary stamp, cancelled.]

Taken and approved this November 23rd, 1900.

R. F. TAYLOR,
Chief Justice Supreme Court of Florida.

42 UNITED STATES OF AMERICA, }
State of Florida, } *ss:*

I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing pages, numbered from one (1) to forty-one (41), inclusive, contain a true and complete transcript of the record of the proceedings had in said court in the case of The Capital City Light and Fuel Company, a corporation under the laws of Florida, appellant, against The City of Tallahassee, a municipal corporation of the State of Florida, appellee, as the same remain of record and on file in said office.

Seal Supreme Court of the State of Florida.

In testimony whereof I have caused the seal of said supreme court to be hereunto affixed, at the city of Tallahassee, in the State of Florida, this the 1st day of December, in the year of our Lord nineteen hundred.

B. B. WILSON,
Clerk Supreme Court, State of Florida.

43 The foregoing transcript of the record of the proceedings of the supreme court of the State of Florida in the case of The Capital City Light and Fuel Company, a corporation under the laws of Florida, *vs.* The City of Tallahassee, a municipal corporation of the State of Florida, is transmitted to the Supreme Court of the

United States in obedience to a writ of error issued herein, the original of which is hereto attached.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

44 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Florida, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Florida, before you or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between the Capital City Light and Fuel Company, a corporation under the laws of the State of Florida, and the City of Tallahassee, a municipal corporation of the State of Florida, wherein was drawn in question the validity of a statute of and an authority exercised under said State of Florida, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said The Capital City Light and Fuel Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-first day of December, A. D. nineteen hundred (A. D. 1900), in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of November, in the year of our Lord one thousand nine hundred (A. D. 1900), and clerk of the circuit court of the United States for the fifth judicial circuit, northern district of Florida.

[Seal U. S. Circuit Court, Northern Dist. of Florida.]

F. W. MARSH,
Clerk of the United States Circuit Court for the Fifth Judicial Circuit and the Northern District of Florida.

Writ of error allowed November 9th, A. D. 1900.
R. F. TAYLOR,
Chief Justice Supreme Court of Florida.

[Endorsed:] Filed Nov. 22, 1900. B. B. Wilson, clerk supreme court, State of Florida.

45 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the City of Tallahassee, a municipal corporation of the State of Florida, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 21st day of December, A. D. nineteen hundred, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Florida, wherein The Capital City Light and Fuel Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final decree therein rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. F. Taylor, chief justice of the supreme court of the State of Florida, this 22nd day of November, in the year of our Lord nineteen hundred (A. D. 1900).

R. F. TAYLOR,
Chief Justice of the Supreme Court of Florida.

By the chief justice.
Attest:

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

We hereby acknowledge service of this citation this 22nd day of November, 1900.

GEO. P. RANEY,
Attorney for The City of Tallahassee, Def't in Error.
R. B. GORMAN,
Mayor of the City of Tallahassee.

[Endorsed:] Filed Nov. 22, 1900. B. B. Wilson, clerk supreme court, State of Florida.

46 In the Supreme Court of Florida, June Term, A. D. 1900.

THE CAPITAL CITY LIGHT AND FUEL COMPANY, a Corporation under the Laws of Florida, Appellant,
vs.
THE CITY OF TALLAHASSEE, a Municipal Corporation of the State of Florida, Appellee.
} Leon County.

Statement.

The Tallahassee Gas and Electric Light Company was incorporated in December, 1887, under the general incorporation laws then in force. In its articles of association it claimed power to sue and be sued, and to hold, lease, buy, sell, mortgage, or otherwise dispose of such realty and personalty as might be necessary for the pur-

poses therein stated. Its object and purposes were, as therein stated, to construct, maintain, and operate gas works and electric light works in the city of Tallahassee, to manufacture gas for light and fuel, or to dispose of and deal in coal or wood for fuel, and to maintain and operate electric light machinery for supplying lights in said city, or for manufacturing and dealing in all manner of artificial light or heat within said city. The duration of the association was to be for twenty-five
47 years. The capital stock of the company was to be $50,000, divided into shares of $100 each. The indebtedness was limited to an amount not exceeding the capital stock. Its principal place of business was to be at Tallahassee, Florida. The capital was to be paid in as required by law and by-laws to be adopted. The business was to be conducted by a board of not less than three nor more than five directors, one of whom was to be made president, and officers were required to be elected annually. Such subordinate officers were provided for as might be determined. After the incorporation of said company it applied to the city of Tallahassee for the franchise of erecting gas and electric light works in the city, and in January, 1888, the city passed an ordinance entitled "An ordinance to grant certain privileges to the Tallahassee Gas and Electric Light Company," which by its first section provided that the Tallahassee Gas and Electric Light Company be, and was thereby, authorized to construct gas and electric light works in the city of Tallahassee, and for that purpose the said company were to have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same, and to erect such lamp posts or poles or towers as might be necessary or essential for furnishing gas or electric lights in said city, and to this end said company was authorized to make such excavations or erect such structures, poles, or towers and run wires thereto along the streets of the city, as might be necessary or essential, provided that in laying such pipes or erecting such lamp posts, poles, or towers the said company should not obstruct any street for a longer term than twelve hours. The second, third, fourth, and fifth sections regulated the manner of laying pipes and erecting poles, towers, &c. The sixth section provided that the company should not be permitted to manufacture or supply gas for
48 illuminating purposes of less than eighteen-candle power, or to charge private consumers for said gas at any time an amount exceeding $2.50 per one thousand feet, and the charge to the city for gas lamps was not to exceed $30 per annum for each lamp, of not less than twenty-candle power, through burners of a capacity of four feet per hour. The seventh section provided that within thirty days from the taking effect of the ordinance the said company, their associates, successors, and assigns, were required to file a written acceptance thereof in the office of the city clerk, whereupon the ordinance was to become binding upon both parties; the construction of the gas works was required to be commenced within thirty days after filing said acceptance, and said gas works were required to be completed and in practical operation within six months after the commencement of the construction thereof, and the com-

pany was thereby required to put in and operate electric lights as soon as sufficient consumers could be secured to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights. Section eight provided that if the company failed to complete the gas works within the time prescribed in the foregoing section, or failed to furnish gas at any time for the space of six months, or violated any of the provisions of the ordinance, the city council in its discretion might declare the ordinance null and void and repeal the same. The ninth section related to the lease of certain lands by the city to the company for a nominal sum per year for ninety-nine years. The tenth section provided that the city, in consideration of the foregoing requirements being complied with on the part of the company, their associates, successors, and assigns, obligated itself to take all gas it might wish to use in lighting its streets or buildings
49 from said company at a price of not more than $1.50 per thousand feet, or such as might be used in public buildings used by the city, and at a price of not more than $30 per annum for each street lamp, as provided for in section six of the ordinance, for the period of twenty-five consecutive years from the completion of the gas works, provided that nothing therein was to be construed as an obligation on the part of the city to take any gas from the company. Section eleven was as follows: "That the privileges and licenses herein and hereby granted shall be exclusive in and to said Tallahassee Gas and Electric Light Company, their associates, successors, and assigns, for and during the term of twenty-five years."

The Tallahassee Gas and Electric Light Company constructed its gas works under and in conformity to the terms of its charter and the ordinance, and began and continued the operation of the same and exercised the powers, privileges, and franchises conferred on it by the charter and ordinance, including the contract for lighting the streets and buildings of the city, without molestation or interference until November, 1893, when the gas works, plant, and property of every kind and character of the company were taken possession of by a receiver appointed by the circuit court of Leon county in a chancery cause wherein Wm. M. McIntosh, Jr., as trustee, was complainant and the company was defendant, and by virtue of a decree of foreclosure and sale made in said cause, dated January 4, 1894, all lands belonging to the company, with the tenements, hereditaments, and appurtenances thereon and thereunto belonging or appertaining, and also the plant, machinery, and attachments thereto, whether movable or immovable or whether pertaining to the realty or personalty, and the corporate franchise of
50 said company, and all classes of property, real, personal, and mixed, then owned by said company, were sold at public sale on February 5, 1894, to Wm. A. Rawls, and a deed executed to him therefor under decree of the court. Thereafter, in March, 1894, the appellant company was incorporated under the general incorporation laws then in force for the purpose of acquiring and operating, under the terms of the city ordinance, the property purchased by Rawls under the decree, and in pursuance of this purpose Rawls

made over said property to the appellant company, who entered into possession and assumed the management and control thereof and continued the manufacture of gas for the purpose of supplying the city and its inhabitants with light and heat, and enlarged and extended the plant to meet the increased demands of the city and its inhabitants, and the city has ever since recognized, treated, and dealt with the appellant company as the lawful successor to the Tallahassee Gas and Electric Light Company and the legal assignee of all the rights, franchises, privileges, and contracts created and conferred on the Tallahassee Gas and Electric Light Company by the said ordinance. The general nature of the business to be transacted by the appellant corporation, as expressed in its articles of association, was to acquire, construct, improve, maintain, and operate gas works and electric light works in and adjacent to the city of Tallahassee, and to manufacture gas for light and fuel, to dispose of and deal in coal or wood for fuel, to construct, maintain, and operate electric light machinery for supplying lights in and about said city, or for manufacturing and dealing in any and all manner of artificial light or heat within or adjacent to said city.

At no time since the establishment of the gas works could there have been procured sufficient consumers of electric light to
51 pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and to put in practical operation an electric lighting system in the city of Tallahassee.

By chapter 4600, Acts of 1897, cities and towns were expressly authorized to construct, purchase, lease or establish, and maintain one or more plants for manufacture or distribution of gas or electricity for furnishing light for municipal use and for the use of such of its inhabitants as might require and pay for same under conditions therein mentioned.

By chapter 4875, Laws of 1899, the city of Tallahassee was specially authorized to exercise the powers provided by the said act of 1897, and the manner of exercising such powers was therein specified. In pursuance of the provisions of these statutes, the city of Tallahassee has since August, 1899, done everything necessary to enable it, under the authority there conferred, to construct, establish, and maintain an electric light plant for the manufacture and distribution of electricity for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for same, and in March, 1900, was preparing to construct such a plant. Thereupon a bill was filed in the circuit court of Leon county by appellant against the city alleging the foregoing facts and praying that the city be enjoined from establishing such a plant, alleging that its establishment would infringe upon appellant's alleged exclusive right to establish and maintain an electric light plant in the city of Tallahassee, which it claims to have derived from the Tallahassee Gas and Electric Light Company in the manner stated. It is claimed that the Tallahassee Gas and Electric Light Com-
52 pany derived such exclusive right from the provisions of its charter and the city ordinance, and that such charter and

ordinance constitute contracts between it and its assigns and the city, which cannot be impaired by subsequent legislation authorizing the city to construct and maintain and electric light plant.

The cause was heard in the court below upon an application for temporary injunction as prayed and upon a demurrer to the bill for want of equity filed by the city. Upon the hearing, May 15th, 1900, the application for injunction was refused, the demurrer sustained, and the bill dismissed; from which decree this appeal was entered.

Opinion.

Per Curiam (after stating the facts):

As will be observed from the statement of the pleadings, the city of Tallahassee is asserting no right to put in and operate a plant for manufacturing gas to supply light and heat for the use of the city or its inhabitants. It proposes to erect a plant to furnish lights for municipal use and for the use of its inhabitants by means of electricity only. A careful reading of the ordinance passed in 1888 will show that the city is under no obligation whatever to the appellant or its predecessor company to light the streets and public buildings of the city with either gas or electricity manufactured by said companies.

53 Nothing is said in the ordinance about lighting the streets or public buildings with electricity manufactured by the company. In respect to gas, the city was not required to use any at all, but it obligated itself to take all gas that it might wish to use in lighting its streets and buildings from the company at prices not to exceed the amounts named for a certain term of years. There is no contract, therefore, between the city and the company that the latter shall have the right to furnish the city for lighting its streets and public buildings all or any electricity used for that purpose, nor is there any stipulation in the ordinance that the city will use nothing but gas, nor that the city will not own or operate an electric light plant for supplying the city and its inhabitants with light. If the city is debarred from erecting an electric light plant by the ordinance passed by it, it is because that ordinance legally grants the company the exclusive privilege and license to use the streets, alleys, and lots of the city for the purpose of constructing and operating a plant and its instrumentalities for furnishing electric lights in the city. Our first duty is, therefore, to determine whether the ordinance legally grants this exclusive privilege and license.

At the time of the passage of the ordinance all the powers possessed by the city of Tallahassee in reference to lighting the city and authorizing the erection of structures in and over the streets were contained in the general incorporation law for cities and towns. A general power was given "to provide for the lighting of the streets of the city or town" (section 21, p. 249, McClellan's Dig.), and also "to regulate, improve, alter, extend and open streets, lanes and avenues, and to cause encroachments and obstructions, decayed buildings and

ruins to be removed." Section 17, p. 248, *ibid.* These powers
54 gave the city no authority to grant any exclusive privilege to use the streets of the city for the purpose of laying pipes or erecting poles and towers for furnishing gas or electric lights. Florida Central and Peninsular R. R. Co. *v.* Ocala Street and Suburban R. R. Co., 39 Fla., 306; 22 South. Rep., 692; Grand Rapids E. L. & P. Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep., 659, and authorities there cited. So far as any exclusive privilege for the use of the streets claimed under the ordinance by the appellant or its alleged predecessor is concerned, it is sufficient to say that no such exclusive right could be granted by the city because of the want of power to grant it. That portion of the ordinance attempting to grant such exclusive use, either as to gas or electricity, is therefore void. The appellant does not, however, rely exclusively upon the provisions of the statutes quoted for authority in the city to grant the exclusive feature of the ordinance in question. It contends that the ordinance may be sustained under a power conferred by the general incorporating act under which its alleged predecessor company was chartered, to the effect that "any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation; provided, however, that this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit: the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience and to take private property for the public use, and the like." Section 30,
McClellan's Dig., p. 234. We do not think this section adds
55 anything to the powers of the city; it has no reference whatever to municipal bodies; it does not purport to confer any power on them or to aid or supplement the powers conferred by the general law appertaining to the creation of municipal bodies; it purports to grant certain privileges directly by the legislature, but it does not pretend to authorize municipal bodies to grant any, and it is clear from its language that there was no design in enacting it to confer power on municipalities to grant exclusive privileges. Whatever rights and privileges of an exclusive nature the Tallahassee Gas and Electric Light Company possessed must therefore be derived from the general incorporation act under which it was incorporated, and this brings us to the further contention that that company by the provisions of the statute last quoted had an exclusive right to use the streets of the city so far as the business of manufacturing and distributing gas and electricity for the use of the city and its inhabitants is concerned, and that the appellant company has succeeded to all of its rights and privileges; and here it may be well to remark that the statute referred to was repealed before the appellant corporation was chartered under the general law, so that if it possesses any exclusive privileges of the nature claimed they are not derived from its own charter or any ordinance

of the city enacted after its incorporation, but are derived solely from its alleged purchase of its predecessor's property, corporate franchises, and privileges.

The appellee contends that exclusive privileges of the character claimed in this case are not embraced within the class of exclusive privileges which the statute quoted, properly interpreted, meant to grant, and, further, that if they are, such privileges are per-
56 sonal to the original corporation to whom granted, and cannot be transferred to another by mortgage or by judicial sale. It claims also that the public nature of the business in which the company was authorized to engage brings the charter within the proviso of the section which reserves power in the legislature to take away the exclusive feature of the privileges granted under circumstances therein mentioned, and that therefore the legislature had power to repeal the statute, as it did by the adoption of the Revised Statutes of 1892, or at least to modify the exclusive character of the privilege granted so as to authorize the city, for the public interest and convenience, to establish and operate an electric light plant within the city, as it did by the acts of 1897 and 1899. These are questions which we do not find it necessary to decide in the present case, being content to rest our decision upon other grounds which we deem conclusive.

It appears from the pleadings that neither the Tallahassee Gas and Electric Light Company nor the appellant company ever established an electric light plant in the city of Tallahassee in pursuance of the authority conferred upon either of them. From the organization of the first company up to the time the gas plant was sold at judicial sale about six years had elapsed, and from the time of the judicial sale to the time the city began proceedings to enable it to establish an electric light plant about six years more elapsed. During all this period of time neither company attempted to construct an electric light plant as authorized by its charter. In the meantime that provision in the general incorporation law relating to exclusive privileges had been repealed by the legislature of 1891, and an act passed in 1897 specially authorizing cities and towns to establish gas and
57 electric light plants to supply themselves and their citizens with light, and still later, in 1899, special legislative authority was given the city of Tallahassee to establish an electric light plant. Neither the Tallahassee Gas and Electric Light Company nor appellant company has acquired any vested right to erect an electric light plant by the investment of any money in any such plant, and the question arises as to whether or not any constitutional right has been impaired by the repeal of the statute granting the alleged exclusive privilege and by the legislation authorizing the city to do that which is a public benefit, and that which for some twelve years the companies have neglected to do as authorized by their charters and the city ordinance. We are unable to see that any vested right of either company, so far as the establishment of an electric light plant is concerned, is impaired by the legislation which authorizes the city to do that which it now proposes to do. In the first place, the statute, properly construed, does not grant the exclusive privilege in respect to the electric light plant as claimed.

A grant of exclusive privileges to appellant's predecessor would be the grant of a franchise from the State, the possession of which would enable it to obtain a practical monopoly of the gas and electric light business in Tallahassee for the term specified. All such grants are strictly construed against the grantee, and nothing passes thereby but such as is clearly intended. Saginaw Gas Light Co. *v.* City of Saginaw, 28 Fed. Rep., 529; Florida, Atlantic & Gulf Central R. R. Co. *v.* Pensacola & Georgia R. R. Co., 10 Fla., 145. Under the express language of this statute the exclusive privilege did not attach until the corporation was not only organized, but put into successful operation, and the privileges were to attach for twenty years from the time the corporation commenced to carry out in good faith the terms of its
58 articles of incorporation. The condition upon which the exclusive privilege, so far as the electric light plant was concerned, has never been performed, for the company has never been put into successful operation, so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition precedent, and therefore it had no exclusive privilege to transfer to appellant company, so far as the electric light plant is concerned. In the next place, even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right so as to be protected by the constitution of the State or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege. Pearsall *v.* Great Northern Railway Co., 161 U. S., 646; 16 Sup. Ct. Rep., 705; Louisville & Nashville Railroad Company *v.* Kentucky, 161 U. S., 677; 16 Sup. Ct. Rep., 714. See, also, Chincleclamouche Lumber and Boom Co. *v.* Commonwealth, 100 Pa. St., 438. It would be going too far to hold that the clauses of those constitutions protecting the obligations of contracts from impairment would enable one legislature to tie the hands of another in matters of public convenience and interest, such as lighting cities, by granting charters containing exclusive privileges to perform these public benefits, which are held for speculative or other purposes, without attempt to execute the powers granted. Gonzalez *v.* Sullivan, 16 Fla., 791; text, 820; Elliott on Roads and Streets, p. 569 *et seq.*

59 Our attention is called to that clause in the seventh section of the city ordinance which required the company to put in electric lights only when sufficient consumers could be secured to pay eight per cent. interest per annum on the additional capital required to purchase the machinery and put in successful operation electric lights. It would appear from this clause that from the beginning the company only intended to avail itself immediately of that provision of its charter authorizing it to erect a gas plant and to use the other power granted by its charter, together with the city ordi-

nance, to shut out competition in its business from electric light companies, intending only to put in an electric light plant whenever that plant could be made to secure it an annual profit on its investment in that plant of eight per cent. It is quite apparent that the legislature never intended to secure to it any such right, but, on the contrary, intended the privilege to extend only so far as to secure the company from competition in matters wherein it had complied with its charter by being put into successful operation. We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but even if it did have such power it could not confer such exclusive right and at the same time defer construction of the plant until such time as it could be made to pay eight per cent. upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the public purpose of furnishing electric lights for twenty-five years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as
60 it can make an annual profit of eight per cent. on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit (Florida Central and Peninsular R. R. Co. *v.* Ocala Street and Suburban R. R. Co., 39 Fla., 306; 22 South. Rep., 692; Gonzalez *v.* Sullivan, 16 Fla., 791; text, 820), and even if it did, so long as the grantee failed to invest money in a plant, the ordinance could be repealed or modified, being without consideration.

We have not overlooked the fact that the first company performed its charter powers in part by erecting and operating a gas plant, and as to that plant and the business connected therewith it may have possessed exclusive privileges under the statute which could not be impaired by subsequent legislation, and it may be that such privileges passed to appellant through the judicial sale. As to that we express no opinion. But while the purpose of erecting both plants would be the same, in that they would both furnish light to the city and its people, yet they furnish a different light and require separate and different plants and instrumentalities for their operation. We think they are so distinct in character as to amount to separate undertakings, and they are so treated in the articles of association of both companies and in the ordinance. Power to operate the one would not include power to operate the other, and permission to use the streets for one would not include permission to use them for the other. City of Newport *v.* Newport Light Co., 89 Ky., 454; 12 S. W. Rep., 1040. The exclusive privileges as to the electric light plant could not have operated as a consideration for erecting the gas plant, for such privileges under the statute were to attach to the electric light business only when that plant was put in.

The decree of the court below is affirmed.

61 I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing pages, numbered from forty-six (46) to sixty (60), inclusive, contain a true and correct copy of the statement of case and opinion of the supreme court of Florida in the case of The Capital City Light and Fuel Company, a corporation under the laws of Florida, appellant, *vs.* The City of Tallahassee, a municipal corporation of the State of Florida, which was filed in my office on October 10th, A. D. 1900.

Seal Supreme Court of the State of Florida.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Tallahassee, the capital, this 1st day of December, A. D. 1900.

B. B. WILSON,
Clerk Supreme Court, State of Florida.

Endorsed on cover: File No., 17,990. Florida supreme court. Term No., 505. The Capital City Light and Fuel Company, plaintiff in error, *vs.* The City of Tallahassee. Filed December 10th, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 505.

CAPITAL CITY LIGHT AND FUEL COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF TALLAHASSEE, DEFENDANT IN ERROR.

Statement.

The Capital City Light and Fuel Company sought by its bill to enjoin the City of Tallahassee from installing and operating an electric lighting plant for municipal use, and for the use of such of its inhabitants as might require and pay for the same.

The ground upon which the complainant based its application was, that under its charter and an ordinance of said city complainant had the exclusive right and privilege of lighting said city by gas *and electricity*, and that the act of the legislature authorizing the City of Tallahassee to establish and operate such plant and the ordinance under which said city was about to avail itself of the provisions of such act violated the obligation of the contract with complainant.

The complainant company acquired the right, claimed to be *exclusive*, through the Tallahassee Gas and Electric Light Company. That company was incorporated on December 20, 1887, under the general incorporation law. The general nature of the business to be conducted by it, as expressed in its charter, was to construct, maintain, and operate gas works *and electric light works* in the city of Tallahassee; to manufacture gas for light and fuel; to dispose of and deal in coal or wood for fuel; to maintain and operate electric light machinery for supplying light in said city; to manufacture and deal in any and all manner of artificial light or heat within said city.

After its incorporation the Tallahassee Gas and Electric Light Company applied to the City of Tallahassee for the franchise of constructing gas and electric light works in said city for the purposes declared in its charter. The city passed an ordinance January 4, 1888, granting to said company the right to construct gas and electric light works in said city; and, for that purpose, the right to lay its pipes, erect its posts, poles, or towers, and stretch its wires in the streets of said city.

By this ordinance a maximum limit was placed on the price of gas to be furnished, both for public and private lighting, and a minimum candle power of the lights was fixed. The City of Tallahassee also obligated itself to take all gas that it might wish to consume in lighting its streets or buildings from said company, but did not bind itself to take gas. The ordinance also provided that the privileges and licenses therein and thereby granted should be exclusive in and to said company, their associates, successors, and assigns, for and during the term of twenty-five years.

It was further provided by said ordinance that, within thirty days after it went into effect, said company should file its written acceptance thereof in the office of the city clerk, whereupon the same should become binding upon both parties, and that the construction of the gas works

should be commenced within thirty days after filing such acceptance, and completed and in practical operation within six months after the commencement of construction, and that said company should put in and operate electric lights as soon as sufficient consumers could be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery for and to put in practical operation the said electric lights.

The Tallahassee Gas and Electric Light Company constructed its gas works and enjoyed all the rights, privileges, and franchises conferred by its charter and said ordinance until its works were taken possession of by a receiver appointed in a proceeding to foreclose a mortgage given by said company on all its property.

By virtue of a decree of foreclosure and sale rendered in said suit, all the property, real, personal, and mixed, and the corporate franchise of said company were sold and bought in by one W. A. Rawls, who bought for the purpose of making over the property to the Capital City Light and Fuel Company, thereafter to be organized.

The Capital City Light and Fuel Company, plaintiff in error, was organized, after such sale, under the general incorporation law and took over all said property and continued to operate the said gas works, and the City of Tallahassee recognized and dealt with the said Capital City Light and Fuel Company from its organization as the lawful successor of the Tallahassee Gas and Electric Light Company and the legal assignee of all its rights, privileges, and contracts.

This situation continued until the year 1899, when the legislature of Florida passed chapter 4875 of the Laws of Florida, approved May 27, 1899, entitled "An act to enable the City of Tallahassee to exercise the powers provided by chapter 4600 of the Laws of Florida, entitled, 'An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease and estab-

lish, and maintain within its limits, one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, as herein provided,' approved June 5th, 1897, and to declare the manner in which such city may exercise such powers."

(See such parts of these acts as are necessary for a proper consideration of the points involved at the conclusion of the brief.)

The City of Tallahassee took the required steps under the provisions of this act to exercise the authority there granted to construct, purchase, establish, and maintain within the limits of said city a plant for the manufacture of electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same, and to issue its bonds for the purpose of raising the necessary money for constructing such electric lighting plant.

It was at this point that complainant filed its bill for injunction.

The circuit court for Leon county, in which the bill was filed, denied the injunction and dismissed the bill. The complainant appealed from this decree to the supreme court of Florida, and that court having affirmed the judgment of the lower court, this writ of error was sued out.

Assignment of Errors.

The error assigned in the supreme court of Florida was the rendering of the decree of May 15, 1900, by the circuit court of Leon county, wherein and whereby complainant's application for an injunction was denied, defendant's demurrer to complainant's bill sustained, and complainant's bill dismissed.

The error assigned here is that the supreme court of Florida erred in affirming the decree aforesaid of the said circuit court by its final decree of October 10, 1900, there

being drawn into question in said cause the validity of a statute of or authority exercised under the said State of *Florida*, on the ground of their being repugnant to the Constitution of the United States—namely, the validity of a statute of said State approved May 27, 1899, and entitled "An act to enable the City of Tallahassee to exercise the powers provided by chapter 4600 of the Laws of Florida, entitled 'An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease, and establish and maintain within its limits one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided,' approved June 5th, 1897, and to declare the manner in which such city may exercise such powers;" and the validity of an ordinance of said City of Tallahassee passed under authority of the said statute and approved September 11, 1899, and entitled "An ordinance providing for the issue of bonds by the City of Tallahassee for the purpose of establishing and maintaining an electric light plant for municipal use and for the use of its inhabitants, and providing for the submission of the question of the ratification of such ordinance to an election of the qualified voters of said city"—which statute and ordinance, it was contended by plaintiff in error, were repugnant to the Constitution of the United States in that they violated the obligation of a contract which conferred on plaintiff in error the exclusive privilege of operating gas and electric works in the said city of Tallahassee, and the decision of said court was in favor of the validity of the said statute and of the said ordinance.

ARGUMENT.

The plaintiff in error contends that the Tallahassee Gas and Electric Light Company, under the law of its incorporation and the ordinance of the City of Tallahassee granting the use of its streets, had exclusive privileges, for the purposes of its creation, for the term of twenty years from the date it commenced to carry out in good faith the terms of its articles of incorporation, and that these exclusive privileges passed under the foreclosure sale, through the medium of Rawls, the purchaser at said sale, to the plaintiff in error, and that the act of May 27, 1899, authorizing the City of Tallahassee to establish an electric plant for public and private lighting, and the action of the city authorities thereunder, violated the obligation of the contract between the plaintiff in error and the City of Tallahassee and the State of Florida.

The constitution of the State of Florida, adopted in the year 1868, contained the following provision:

SEC. 21 OF ART. IV. "The legislature shall establish a uniform system of county, township, and municipal government."

SEC. 22 OF ART. IV. "The legislature shall provide by general law for incorporating such municipal, educational, agricultural, mechanical, mining and other useful companies, or associations, as may be deemed necessary."

The first legislature that convened under this constitution passed "An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in the State" (chapter 1638, Laws of Florida). This act was approved August 6, 1868.

The same legislature also passed "An act to provide for the creation of corporations and to prescribe their general powers and liabilities" (chapter 1639, Laws of Florida). This act was approved August 8, 1868.

It is clear that both these acts were passed in obedience to the constitutional mandate quoted above, and that each was passed with reference to the other.

Section 12 of chapter 1638 confers upon cities to be incorporated thereunder the power to regulate, improve, alter, extend, and open streets, lanes, and avenues.

Section 15 of chapter 1638 confers the power to provide for the lighting of the streets of the city or town.

Section 1 of chapter 1639 provides that any number of persons may associate themselves and become incorporated for the transaction of any lawful business of a *public* or private character, including all *works of internal improvement.*

Section 2 of this act confers the usual corporate powers.

Section 10 confers upon any corporation organized under this act the power to enter upon any land or lands, public or private, necessary to the business contemplated in its articles of association.

Section 37 provides that nothing contained in this statute should be construed to extend to any *county* or *township.*

Mark the omission here of *municipal corporation* as grouped with *county* and *township* in section 21, article IV, of the constitution of 1868.

Section 38 provides that any corporation organized and put into successful operation under this act shall have *exclusive privileges for the purposes of its creation* for the term of twenty years from the date the corporation commences to carry out in good faith the terms of the articles of incorporation, provided that this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit, the power to create revenue for public purposes, to provide for the common defense, to provide for safe and convenient ways for the public necessity and convenience, and to take private property for public use, and the like.

McClellan's Digest, sec. 30, p. 234.

The language of section 15 of chapter 1638 with reference to the lighting of the streets of cities is very general in its terms. It is: "Shall have power * * * to *provide for* the lighting of the streets."

It is clear from the language of section 1 of chapter 1639 that corporations could be created thereunder for either *public* or private purposes. It could have been intended, however, to confer the power of eminent domain and the exclusive privilege franchise only on corporations created for a *public* purpose. It would not be contended, for instance, that a corporation created for the purpose of conducting a grocery business in the city of Tallahassee would either have the right to condemn a building to be used for its business or have a monopoly of the grocery trade in the city. But these provisions must be given some meaning, and they can only be extended to such subjects as they had previously been known to relate to. The commissioners appointed to revise the statutes of Florida omitted from the revision (adopted as an entirety by the legislature of 1891) the provision for exclusive privileges, and limited by express language the exercise of the right of eminent domain to coporations organized for the purpose of constructing, maintaining, or operating *public works.*

Rev. Statutes of Fla., sec. 2158.

The Tallahassee Gas and Electric Light Company was incorporated under the laws, to which reference has been made, for the purpose of constructing, maintaining, and operating gas works and electric light works in the city of Tallahassee and for manufacturing and dealing in any and all manner of artificial light within said city.

See Exhibit A, Record, p. 10.

This was a public work, and the company acquired the right of eminent domain and exclusive privileges for the purpose of its creation for the term of 20 years from the date

the corporation commenced to carry out in good faith the terms of its articles of incorporation.

The Tallahassee Gas and Electric Light Company could only have such powers and franchises as were conferred upon it by its own charter or by the city of Tallahassee under a proper exercise of its powers.

At the time of the incorporation of the Tallahassee Gas and Electric Light Company the city council of the city of Tallahassee had the power *to provide* for the *lighting of the streets* of the city and to do and perform all such other acts as should seem necessary and best adapted to the improvement and general interest of the city.

McClellan's Digest, p. 249, sec. 21.

The power to light the streets carried with it the choice of means to accomplish that end.

Jacksonville Electric Light Co. *vs.* City of Jacksonville, 36 Fla., 271.

The city council also had the power to regulate, improve, alter, extend, and open streets, lanes, and avenues, and to regulate and control the grading, construction, and repairs of all streets, pavements, and sidewalks.

McClellan's Digest, p. 248, secs. 17 and 19.

The law of incorporation of the Tallahassee Gas and Electric Light Company must be construed in connection with the law of incorporation of the city of Tallahassee.

State of Fla. *ex Rel. vs.* Jacksonville St. R'y Co., 29 Fla., 590.

"The authority of a general nature to regulate and control the streets, usually granted to municipal bodies, is generally deemed sufficient to clothe the municipal body with the right to grant, or refuse, or otherwise to regulate, the uses of the streets for street railways operated by horse power."

Ibid.

"A difference exists between the power of a municipal corporation to grant a corporate franchise, and the right to permit a corporation vested with such a franchise to place railroad tracks in the public streets. If the municipal body can ever grant a corporate franchise, such power must be expressly conferred by the legislature."
Ibid.

The same may be said of the use of the streets for gas and water pipes and electric poles and wires.

We quite understand that "the powers conferred upon cities and towns by the general act (section 17, page 248, McClellan's Digest) do not confer upon municipal corporations established thereunder the right to vest, by contract, in a street railway company an *exclusive* right to construct tracks on all streets of the city as laid out."

F. C. & P. R. R. Co. *vs.* Ocala St. & Sub. R. R. Co., 39 Fla., 306.

But, as we have seen, the city of Tallahassee had the express power to provide for *lighting its streets* and to do all such other acts as might be best adapted to the improvement and general interest of the city.

McClellan's Digest, p. 249, sec. 21.

The furnishing of gas and electricity for *domestic consumption* was adapted to the improvement and general interest of the city.

The city having the full control and management of its streets, the Tallahassee Gas and Electric Light Company, though incorporated for the express purpose of lighting the city of Tallahassee, could not use the streets of said city for the purpose of laying its pipes and erecting posts and wires without the consent of the city. Therefore this company, after its incorporation, applied to the city of Tallahassee for authority to construct gas and electric light works in said city, and for that purpose to lay pipes and erect such lamp

posts or poles or towers and run wires thereto in and along the streets of said city as might be necessary or essential for furnishing gas or electric lights in said city of Tallahassee.

On January 4, 1888, an ordinance was passed by the council of the city of Tallahassee, pursuant to this application, authorizing the Tallahassee Gas and Electric Light Company to construct gas and electric light works in said city, and for that purpose the right to lay its pipes in any and all streets, alleys, and lots thereof and to erect such lamp posts or poles or towers as might be necessary for furnishing gas and electric lights in said city, and, to that end, to make such excavations or erect such structures, poles, or towers, and run wires thereto along the streets of said city, as might be necessary or essential.

See Exhibit B, Record, p. 11.

Sections 2, 3, 4, and 5 of the ordinance prescribe regulations to control the company in its use of the streets while putting in its plant.

Section 6 of the ordinance provides for the minimum candle-power of the gas to be furnished for illuminating purposes and a maximum price to be paid by private consumers per thousand feet and by the city per lamp.

Section 7 provides that the company must file its written acceptance of the terms of the ordinance with the city clerk within thirty days after it takes effect; whereupon the same shall become binding on both parties; and it also provides the time when the construction of the *gas works* must be commenced and completed, and that the company shall put in and operate *electric light works* as soon as sufficient consumers can be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery and to put in practical operation the said electric lights.

Section 8 provides that if the company shall fail to furnish gas at any time for the space of six months or shall

violate any provision of the ordinance, the council may repeal the same.

By section 10 of the ordinance the city binds itself to take from the company all the gas that it may wish to use in lighting its streets or buildings for the period of twenty-five years, but with the proviso that it does not obligate itself to take any gas.

Section 11 provides that the privileges and licenses granted shall be exclusive in and to said company, their associates, successors, and assigns, for and during the term of twenty-five years.

All the corporate franchises of the Tallahassee Gas and Electric Light Company were acquired by it from the provisions of the act under which it was incorporated, as it existed at the time the company accepted and complied with the terms of the said act in effecting its organization.

Under the terms of that act the company had exclusive privileges for the purpose of its creation for the period of twenty years.

When the city passed the ordinance of January 4, 1888, it was with knowledge that the company upon being put into successful operation under its charter would have such exclusive privileges for the term of twenty years from the date the company commenced to carry out in good faith the terms of its articles of incorporation.

In the case of State *ex rel. vs.* Jacksonville St. R'y Co., 29th Fla., 590, the supreme court of Florida holds that the street railway, which was incorporated under the general act for the incorporation of railroads and canals, obtained its *franchises* by virtue of its incorporation, but that the city of Jacksonville having control of its streets, under the act of its incorporation, the railroad company could not occupy the streets without the consent of the city, and that the city in giving its consent might impose conditions and burdens on the company not imposed by the law of its organization.

In other words, that court has construed the two acts (the general act for the incorporation of railroads and the general act for the incorporation of cities) together; and the railroad company, having been admitted to the streets of Jacksonville, had all the rights and powers conferred by its charter, except where restrained or conditioned by the ordinance admitting it to the use of the streets.

The City of Tallahassee in its ordinance granting the use of its streets to the Tallahassee Gas and Electric Light Company, while imposing some requirements as to brilliancy and price of lights and manner of using streets during construction, went even further than the act of incorporation as to the term of the exclusive privilege, making it twenty-five years—the period of the full life of the corporation—instead of twenty years, as provided in the general incorporation law.

The legislature, where not restrained by constitutional limitation, can grant the exclusive right to a corporation or individual to furnish light or water to a city.

State *vs.* Milwaukee Gas Light Co., 29th Wis., 454.
New Orleans Gas Co. *vs.* La. Light Co., 115 U. S., 671.
New Orleans Water Co. *vs.* Rivers, 115 U. S., 680.
Louisville Gas Co. *vs.* Citizens' Gas Co., 115 U. S., 683.
Crescent City Gas Light Co. *vs.* New Orleans Gas Light Co., 27th La. Ann., 138.

It makes no difference whether the franchise is granted by special act or acquired under a general law, so it proceeds from the legislative authority of the State.

There is no limitation upon the legislature in this respect in the constitution of Florida.

Such franchise, when granted and accepted and acted

upon, becomes a contract which cannot be impaired by subsequent legislation.

New Orleans Gas Co. *vs.* Louisville Light Co., 115 U. S., 671.

City of Quincy *vs.* Bull, 106 Ill., 351.

State *ex rel. vs.* Columbus Gas Light & Coke Co., 32 Am. Rep., 390.

Walla Walla City *vs.* Walla Walla Water Company, 172 U. S., 1.

This fact does not restrict the State or city to legislate to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contract.

See cases last cited.

The proviso of section 30, page 234, McClellan's Digest of the Laws of Florida, recognizes this principle and expressly provides that this investment (with exclusive privileges) shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit, the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like.

Also, by chapter 4052, Acts of 1891, the legislature of Florida has recognized this principle and expressly gives cities police power over such corporations, and provides a means of forfeiting their charters in case any reasonable regulation or requirement of this character is not complied with.

Section one of this act provides that—

"whenever any street railroad, gas, electric lighting, telephone, telegraph, or other company or corporation, person or firm, which has received or shall receive from any mu-

nicipal corporation in this State any franchise, grant, right, privilege, license, or immunity to use, or under which such company, corporation, person or firm, shall use, any of the streets or parts thereof, within such municipal corporation, for the placing or maintaining in such streets of any tracks, pipes, wires, poles, or other things necessary to the carrying on of the business of such company, corporation, person or firm, shall violate any of the terms, conditions or provisions of such grant, privilege, right, license or immunity, or shall fail to comply with any reasonable provision of any ordinance of such municipal corporation regulating the use by such company, corporation, person or firm, and shall continue to violate the terms, conditions, or provisions under which such franchise, grant, privilege, right, license or immunity was given, or to violate the reasonable provisions of such ordinance, regulating the use by such company, corporation, person or firm, of such streets, for a period of five days after said company or corporation shall have been notified in writing by the mayor, or chairman of the board of public works, or president of the city council, of such municipal corporation, to desist from such violation, then such company, corporation, person or firm, shall be deemed to have forfeited and annulled, and shall thereby forfeit and annul, all of the said franchises, grants, privileges, rights, licenses and immunities, and such forfeiture shall be so declared by the judge of the circuit court for the county in which such municipal corporation shall be located, upon the affirmative finding of the jury trying the case as prescribed in the following sections."

But where the contract is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

Walla Walla City *vs.* Walla Walla Water Company,
172 U. S., page 1.

It is true that the City of Tallahassee did not obligate itself to take any gas from the company for lighting its streets or public buildings, but it did thereby contract, if it used gas at all, to take it from said company. The power in

a municipal corporation to light its streets does not make it the duty of the city to do so.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

It may even lease its own gas works to a private party or corporation under contract to light the city.

Ibid.

And a provision of an ordinance leasing city gas works that the city will not in any way interfere with, limit, restrict, or imperil the exclusive right thereby vested in the gas company does not create a monopoly against public policy where the franchise of the lessee is derived from the legislature and not from the city, and it merely makes the privileges exclusive so far as the city is concerned.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

Walla Walla City *vs.* Walla Walla Water Company, 172 U. S., 17.

The inability of a common council to bind the discretion of its successors for a term of years in respect to a municipal or governmental function does not extend to a lease of city gas works, in respect to which the city acts in a business capacity solely.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

Ill. Trust & Savings Bank *vs.* Ark. City, 34 L. R. A., 518.

The ordinance of January 4, 1888, by its seventh section, provided that when accepted by the company it should become binding upon both parties. The company, though incorporated solely with a view of operating in the city of Tallahassee and possessed of all the necessary franchises to do so, when the right to occupy the streets should be conceded by the city, was under no contractual obligation to the city to enter upon its proposed business until it had accepted the terms of the ordinance. While the city could

not confer any franchise on the company, still it had the power, under the authority of the decisions above cited, to enter into a contract with a company having all the necessary franchises to light the city that the municipal corporation itself would not become a competitor in such business. We contend that the provision of section 11 of the ordinance, that the privileges and licenses thereby conferred should be exclusive to the company, their associates, successors, and assigns, for twenty-five years, while not conferring on the company an exclusive *franchise* to the use of the streets, was at least a contract on the part of the city that the municipality itself would not become a competitor with the company in such business during that period, the said company having been incorporated with a view solely of operating in the city of Tallahassee, and, under the law of its organization, the privileges conferred being exclusive when the company accepted the terms and conditions of the ordinance.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

Walla Walla City *vs.* Walla Walla Water Company, 172 U. S., page 1.

Atlantic City Water Works *vs.* Atlantic City, 39 N. J. Eq., 367.

Southwest Missouri Light Co. *vs.* City of Joplin, 101 Fed. Rep., 23.

In the Walla Walla case this court say:

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company will necessarily incur a large expense in the constructing of the power-house and in laying the pipes through the streets, and as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible,

and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would not have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion to which all municipalities are more or less subject the city might resolve to enter the field itself, a field in which it undoubtedly would have become the master, and practically extinguished the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

But if, in view of the fact that the city made no positive contract with the company to light its streets with gas and no contract at all to take electricity for lighting purposes, the franchise of the company is not exclusive, so far as the lighting of the streets is concerned, yet the city, at the time of the incorporation of the company and the passage of the ordinance, had no power to enter into the business of domestic lighting for compensation, and such privilege having been acquired by the company, and being exclusive under its charter, it cannot be violated or impaired by subsequent legislation authorizing the city to become a competitor in such business. This is attempted to be done under chapter 4875, Laws of Florida, Acts of 1899, page 306.

But it is contended on behalf of the city that the city, in undertaking to furnish electric lighting, does not violate any right of the company, as its lighting plant is a gas plant.

Had the franchise granted to the company by its charter been to light with gas solely, the contention would be good, for we are aware that the grant of an exclusive privilege of lighting with gas does not preclude the subsequent granting to another of the right to light by electricity, nor does a

grant to one of the exclusive right to supply a city with water from a particular stream preclude a subsequent grant to another of the right to supply the city from a different stream.

Saginaw Gas Light Co. *vs.* City of Saginaw, 28th Fed., 529.

Stein *vs.* Bienville Water Supply Co., 141 U. S., 67.

But in the case at bar the right acquired by the Tallahassee Gas and Electric Light Company under its charter was to light with both gas and electricity and "all manner of artificial light," but by agreement with the city, under the terms of the ordinance, the council, presumably with a full knowledge of the population of the city and of the conditions existing there, only required the company to put in and operate electric lights when sufficient consumers could be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery for and to put in practical operation the said electric lights.

It is true that the council had no power to add to or subtract from the *franchises* granted by the State, except, as in the case of occupying the streets, something was required under the law, as it existed at the time of acquiring the charter, to put the franchises into operation. But it was within the power of the council of the city to provide, in view of the fact, which must have been known to them, that the operation of both systems could not at the time pay a fair return on the capital invested, that the company would not be required to operate the electric plant until it could realize at least 8 per cent. interest (the legal rate) on the capital invested. The case of Gonzalez *vs.* Sullivan, 16 Fla., 791, we do not think conflicts with this proposition. The facts of the two cases differ.

And this is not inconsistent with the evident purpose of the company to procure a charter that would cover both gas and electricity, as well as the whole field of artificial light-

ing, so as to prevent interference from competition by *any* method of lighting.

It appears from the allegations of the bill that there has never been a time when 8 per cent. on the capital that would be required to put into operation an electric lighting system in said city could be earned.

Up to this point we have considered only the question as to what were the rights and franchises of the Tallahassee Gas and Electric Light Company. The next question to be considered is, Did the franchises of this company to operate gas and electric light works in the city of Tallahassee and the exclusive right to this privilege pass under the foreclosure sale to Rawls, and from him to The Capital City Light and Fuel Company, plaintiff in error, under his deed of transfer or assignment.

The Tallahassee Gas and Electric Light Company had the power, under the law of its creation, to hold, buy, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its articles of incorporation.

McClellan's Digest, page 228, sec. 3.

The right to lay and keep its pipes in the streets and to use the streets for the purposes of its business is a franchise, and one that is essential to the use of its property. This franchise necessarily passes with a sale of the property. But does it retain its exclusive character?

"The franchise of being a corporation is not assignable. Neither the franchise involving the performance of public duties, nor the property necessary to the exercise of such franchise, is assignable, without the consent of the State. Subject to the exception just named the secondary franchises of a corporation, that is those peculiar and exclusive privileges which do not consist in the right of being a corporation, are property, and hence assignable."

Thompson on Corporations, sec. 5352.

"If the property of a corporation is of such a character as to be adapted only to a particular use, a grant of authority to the corporation to transfer or mortgage the property would by implication include a grant of authority to confer upon the transferee, or purchaser under the mortgage, the right and power of applying the property to the particular use for which it is adapted. Otherwise the grant of the authority to transfer or mortgage the property would be nugatory. A sale or mortgage of the property would destroy its usefulness, and confer nothing of value on the purchaser or mortgagee.

"This principle of construction has special application to a grant to a railroad company of authority to sell, lease or mortgage, its railroad. The property of a railroad company is practically worthless, except for use and operation as an entire railroad. Railroad companies do not ordinarily own the road-bed, but have a mere right of way, or easement, for railroad purposes; and, even if they own their road-beds in fee, it is evident that the land and the rails, ties, and other structures, would be of no substantial value without the right of using them as a railroad.

"It is immaterial whether the right of using and operating the railroad be regarded as a statutory right called a franchise, or as a license conferred by a municipality, or as a mere easement or property right existing under the common law, a transfer of the property pursuant to authority conferred by law would include a transfer of every right necessary for its continued operation."

Morawetz on Corporations, sec. 932.

Detroit *vs.* Natural Gas Light Co., 43 Mich., 594.

A statutory power conferred upon a railroad company to execute a mortgage upon the road and its property carries with it, by necessary implication, the power to include in the mortgage its franchise of building the railroad.

Barnstown R. R. Co. *vs.* Metcalfe, 4th Metc. (Ky.), 199.

Coe *vs.* Columbus, etc., R. R. Co., 10 Ohio St., 372; S. C., 75th Am. Dec., 518.

Trask *vs.* McGuire, 18th Wallace, 391.

Cal. St. Tel. Co. *vs.* Alta Tel. Co., 22d Cal., 398.

Atkinson *vs.* Marietta, etc., R. R. Co., 15th Ohio St., 21.

If the privilege of operating gas and electric light works in the city of Tallahassee and using the streets of the city for that purpose was exclusive, such exclusiveness was a valuable feature of the franchise. The foreclosure and sale did not carry with it the franchise of being a corporation, which had been conferred on the Tallahassee Gas and Electric Light Company, or the power to sue and be sued, to use a corporate seal, etc., but it did carry all its property and the right to use it for the purposes for which it was designed and adapted.

The franchise *exclusiveness* could not remain in the Tallahassee Gas and Electric Light Company after the sale, because, had it done so, it would have precluded the purchaser from making use of the property as an entirety, for the exclusive right remaining in the Tallahassee Gas and Electric Light Company would have been violated the moment Rawls or the Capital City Light and Fuel Company began to use the gas works for the purpose for which they were constructed. The mortgage and the foreclosure sale thereunder did not destroy any franchise, for such as did not pass by the sale remained with the mortgagor company, and if that be true and the view that the franchise of exclusiveness remained in the original company is inconsistent with the use of the mortgaged property by the purchaser, then such franchise must have passed with the property.

An exclusive franchise may pass by sale.

Cal. St. Tel. Co. *vs.* Alta Tel. Co., 22 Cal., 298.
Thompson on Corporations, sec. 5369.
Detroit *vs.* Mutual Gas Co., 43 Mich., 594.
Willamette *vs.* Bank, 119 U. S., 191.

If this exclusive privilege passed with the property and the right to use it, there was nothing in the fact that the purchaser was an individual inconsistent with the enjoyment of the privilege.

If an individual could enjoy it, then a corporation clothed

with the power of using the property could acquire it, it having been legally created and being the subject of mortgage and sale, although such exclusive privilege was not one of the franchises conferred on the second corporation by the act of its creation, as that feature of the general incorporation act was omitted from the Revised Statutes in 1891, and the Capital City Light and Fuel Company was incorporated in 1894.

The exclusive right was created with the original corporation. That company had the power to and did mortgage its property. This exclusive privilege was a valuable incident to the use of the property mortgaged, and the retention of it by the original company was inconsistent with the mortgage and the sale under it and the use of the property by the purchaser. While the second company had no exclusive franchise under its own charter, there was nothing which prevented it, under its general power of *acquiring*, maintaining, and operating gas works and electric light works in the city of Tallahassee, from acquiring by purchase such a right already existing and incident to the property which it acquired under the terms and for the purposes of its charter.

An exclusive privilege conferred is unlike an immunity from taxation granted.

The case of Morgan *vs.* Louisiana, 93 U. S., 217, draws a distinction between franchise and immunity. One is in character positive, the other negative.

Franchises are rights or privileges which are essential to the operation of the corporation and without which its works would be of little value.

Immunity is the right to escape a burden which otherwise would have to be borne in common with others. Exemption from taxation is an immunity. It is personal to the company to which it is granted, and cannot be transferred without express legislative authority.

The plaintiff in error (Capital City Light and Fuel Com-

pany) was incorporated March 19, 1894, with the purpose and intent of acquiring and operating, under the terms and provisions of the ordinance of the city of Tallahassee of January 4, 1888, the property purchased by Rawls under the decree of foreclosure; and the property was purchased by Rawls with the intent and purpose of transferring it to the said company for such purposes; and, in pursuance of such intent and purpose, the said property was made over by him to the Capital City Light and Fuel Company, and the said company at once entered into the possession and assumed the management and control thereof, and continued the manufacture of gas for the purpose of supplying said city and its inhabitants with light and heat, and has, since coming into possession thereof, enlarged and extended its plant to meet the increased demands of said city and its inhabitants; and the said city has ever since recognized, treated, and dealt with the said Capital City Light and Fuel Company as the lawful successor to the said Tallahassee Gas and Electric Light Company and as the legal assignee of all the rights, franchises, privileges, and contracts created and conferred on the said last-named company by the ordinance of January 4, 1888.

See bill, Record, pages 3 and 4.

Such was the situation when the legislature passed the act of May 27, 1899, chapter 4875, Laws of Florida, and it is this act and the resolution and ordinance passed by the council putting it into effect that plaintiff in error claims to be a violation of the obligation of its contract for lighting said city with gas and electricity, and for manufacturing and dealing in any and all manner of artificial light within said city.

The supreme court of Florida, in sustaining the judgment of the circuit court, holds that so far as any exclusive privilege for the use of the streets claimed under the ordi-

nance by the appellant (plaintiff in error) or its alleged predecessor is concerned, it is sufficient to say that no such exclusive right could be granted by the city because of the want of power to grant it, and that that portion of the ordinance attempting to grant such exclusive use, either as to gas or electricity, is therefore void; and, further, they say that whatever rights and privileges of an exclusive nature the Tallahassee Gas and Electric Light Company possessed must be derived from the general incorporation act under which it was incorporated, and this brings them to the further contention of appellant that that company, by the act of its incorporation, had an exclusive right to use the streets of the city so far as the business of manufacturing and distributing gas and electricity for the use of the city and its inhabitants is concerned.

The contention of the plaintiff in error, as attempted to be made before the supreme court of Florida, is not here exactly stated. The exclusive privilege which the plaintiff in error claims is to construct, maintain, and operate gas works and electric light works in the city of Tallahassee; to manufacture gas for light and fuel; to maintain and operate an electric light machine for supplying lights in said city, and to manufacture and deal in any and all manner of artificial light or heat within said city. The company, though incorporated for such purposes, could not occupy the streets over which the city had been given control without the consent of the city, but this consent having been obtained and the purposes of the corporation entered upon, the use of the streets for such purposes became exclusive only incidentally from the fact that no one else could compete with the company in the objects of its creation; and plaintiff in error further contends that the city, charged with notice of the powers of the company under its charter, and having admitted it to the use of its streets for its declared purposes, by the eleventh section of the ordinance in effect contracted that the city at least would not become a competitor in such business.

But the supreme court of Florida holds that, in the view they take of the case, it is not essential to decide whether section 30, McClellan's Digest, page 234, confers exclusive privileges or not, or, if it does, to determine whether such privileges passed from one company to the other by the transfers which took place under the mortgage. They base their decision on the fact that the electric light system has never been put into operation by either company, and hence that the company was never put into successful operation, as contemplated by the act of incorporation (sec. 30, page 234, McClellan's Digest), as *to that feature* of its charter.

The language of this section is:

"Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation."

Was the Tallahassee Gas and Electric Light Company put into successful operation? And did it begin to carry out in good faith the terms of the articles of its incorporation?

This resolves itself largely into a question of fact. Looking to the bill, we find that the city of Tallahassee has a population of about four thousand, a large proportion of which is of a class that is financially unable to use either gas or electricity for domestic lighting; that the company, after organization, applied to the city for the franchise of constructing gas and electric light works in said city for the purposes declared in its charter, and the city by its own ordinance provided that the company should not be required to put in and operate electric lights until a return of 8 per cent. on the additional capital required for that purpose could be secured.

It was evident that the business would not at the time warrant both methods of lighting, and yet the company was not prepared to enter a doubtful field without availing itself

of the protection given by the statute from possible competition from the different instrumentalities used in lighting by covering them in the statement of the objects of its incorporation.

That it was put into successful operation is shown by the fact that the city has continued from the installation of the plant to the time of the filing of the bill to light its streets and public buildings with the gas furnished by the original company and its successor, and the said companies have furnished during all this period gas for domestic lighting, and the works of the company have been enlarged and extended to meet the increased demands, and there has never been a time when a return of 8 per cent. upon the additional capital required to put in an electric light plant could have been yielded.

It seems to us that in the face of these facts it is a mere assumption of a legal conclusion on the part of the supreme court of Florida that the original corporation was not put into successful operation and had not commenced to carry out in good faith the terms of the articles of its incorporation within the meaning of the act, because, forsooth, it had not availed itself of every instrumentality it was empowered to adopt to accomplish the purpose of lighting the city, when the adoption of all, under the conditions existing, would have led to bankruptcy and the consequent defeat of the very object for which the company was created and which the city desired to secure.

The supreme court of Florida argues further that, the electric lighting plant never having been put in by the company, no right to such means of illumination has vested, and hence the legislature had the right to confer that privilege upon the city without violating the obligation of any contract.

And they say that the exclusive privileges as to an electric light plant *could not have operated as a consideration for erecting the gas plant*, for such privileges under the statute

were to attach to the electric light business only when that plant was put in.

We have above respectfully differed with the court in their interpretation of this statute; and we maintain that the exclusive privilege of using the then known instrumentalities of artificial lighting by which the streets of the city and the business places and houses of its inhabitants were to be lighted from a common generating center, and the exclusion of competition by either means, must have been an inducement for putting in a plant for immediate lighting by either of these instrumentalities. If the grant had been only of the right to use the one, then the right to use the other could have been acquired by a different company or could have been exercised by the city itself.

Stein *vs.* Bienville Water Supply Co., 141 U. S., 67.
Saginaw Gas Light Co. *vs.* City of Saginaw, 28 Fed. Rep., 529.

But the fact that the company fails to avail itself of all the instrumentalities covered by its charter to accomplish the purpose had in view in its creation does not have the effect of relieving the legislature from the constitutional inhibition against the violation of the obligation of contract and permitting it to grant to another corporation or individual the right to use such neglected instrumentality.

St. Tammany Water Works Co. *vs.* New Orleans Water Works Co., 120 U. S., 64.

The supreme court of Florida further says that "even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right so as to be protected by the constitution of the State or of the United States until the company has—to say the least—begun to do the thing required by the charter as the consideration for the grant of such

privilege." And they cite as authority to this proposition Pearsall *vs.* Great Northern Railway Co., 161 U. S., 646; Louisville & Nashville R. R. Co. *vs.* Ky., 161 U. S., 677, and Chincleclamouche Lumber and Boom Co. *vs.* Commonwealth, 100 Pa St., 438.

Broadly speaking, this seems to be a correct statement of the law, and the cases cited sustain it. In the Pennsylvania case nothing whatever had been done by the company to carry out the object of its incorporation. In the Pearsall case the right was expressly reserved to alter the charter in any manner not destroying or impairing vested rights. In the Kentucky case it was held that neither of the corporations proposing to consolidate had the power to do so under their charters; but, conceding such power, the provision of the constitution of Kentucky prohibiting the consolidation of parallel and competing lines was a legitimate exercise of the police power of the State.

If the right to establish and operate an electric lighting plant in the city of Tallahassee had been the only power conferred on the plaintiff in error, or the only purpose of its creation, and the company had failed to exercise the right, there is no doubt but that the franchise could have been revoked. Or if the company had been vested with the franchise of establishing and operating an electric lighting plant and constructing and operating a street railway, and had failed to put the latter utility into operation, the legislature would possibly have retained the power to revoke the latter franchise, although the incorporators may have had in view, when securing the charter, the operation of the lighting system and the propulsion of the street cars by the same power. But the two purposes being separate and distinct, they are not interdependent.

In the Pearsall case this court say:

"Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of its corporate charter, such rights, so far as they are necessary to the

full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation."

And again, quoting from Mr. Justice McLean:

"Every valuable privilege given by the charter, and which conduces to an acceptance of it, and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter."

And again:

"But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object to the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public."

And again:

"We do not deem it necessary to express an opinion in this case whether the legislature could wholly revoke the power it had given to this company to extend its system by the construction or purchase of branch lines or feeders since the possibility of an extension of the road, even to the Pacific coast, may have had an influence upon persons contemplating the purchase of its stock or securities, so that a right to do this might be said to have become vested."

Our contention in the case at bar is that the primary object of the incorporation of the Tallahassee Gas and Electric Light Company was to furnish light to the city of Tallahassee and its inhabitants; that the company in the statement of the objects of its incorporation, in its articles, covered both instrumentalities—gas and electricity; that under the law of its incorporation these rights were to be exclusive; that the conditions of population were

such that both systems could not at the time be profitably operated; that the city elected by its ordinance *which system should be put into immediate* operation, and provided that the other should only be required when a reasonable profit could be earned on the capital to be invested; that a competitive system would be destructive of the company's business and property, and, looking forward to the possibility of such competition, both systems were embraced—not for speculative purposes, as intimated in the opinion of the supreme court of Florida might be the case, but as a means of making it a going enterprise and accomplishing the purpose of its creation. There is nothing in the record to show that its work has not been well done, or that any condition has arisen calling for or justifying an exercise of the police power. The two franchises for accomplishing the same end by different instrumentalities are so correlated and interdependent, so interwoven and concomitant, that revoking the one would prove the means of destroying the other. The consideration for accepting the charter was the right to light by both methods, and is entire and indivisible. The court has no means of determining to what extent the right to light by electricity influenced the company to put in its gas plant. Without such franchise, it is more than probable that the company would not have accepted its charter and installed and operated its gas plant. The court can more reasonably infer that the right to light by electricity moved the company to accept its charter, and to act, to the extent that it did thereunder, than that such right did not operate as a consideration for such action on the part of the company. The right to light by electricity continues during the corporate life of the company, and it may be put into execution at any time, but it exists as an exclusive right only "for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation," which, in

our opinion, was the date the gas works were "completed and in practical operation."

Ordinance, sec. 7; Record, p. 12.

For these reasons we think and contend that the statute, which confers upon the city of Tallahassee the right to inaugurate a system of electric lighting for municipal use and for the use of such of its inhabitants as may require and pay for the same, is in violation of the provision of article I, section 10, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

FRED. T. MYERS,
Counsel for Plaintiff in Error.

PARTS OF STATUTES MATERIAL TO DISCUSSION

CHAPTER 4875, LAWS OF FLORIDA.

SECTION 1. That the city of Tallahassee, in this State, may under the limitations provided in said chapter 4600 of the Laws of Florida, approved June 5, 1897, above stated, exercise the powers provided for in said act in the manner set forth in said act; except that where the provisions hereinafter set forth are inconsistent with those provided in said act, then the provisions of this act shall control.

(Section 2 of this act and such part of section 3 as bears upon the case will be found set forth in the bill, pages 4 and 5, printed Record.)

CHAPTER 4600, LAWS OF FLORIDA.

SECTION 1. Any city or town may, under the limitations of this act, construct, purchase, lease or establish and maintain within its limits one or more plants for the manufacture or distribution of gas or electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided. Such plants may include suitable lands, structures, easements, water privileges, stations, gasometers, boilers and engines, dynamos, tools, machinery, pipes, conduits, hose, conductors, burners, lamps and other apparatus and appliances for making, generating, distributing and using gas or electricity for lighting purposes.

* * * * * * *

SEC. 6. Any city or town having obtained a plant for the purpose as provided in this act, may manufacture, generate and distribute gas and electricity for furnishing light for municipal use, or for the use of its inhabitants, under such regulations as it may establish. No city or town shall be compelled to furnish gas or electricity to any person or corporation except upon the order of the gas and electric light

committee of such city or town. Any person or corporation aggrieved by the refusal of any city or town supplying gas or electricity under the authority of this act to furnish the same may appeal to such committee, setting forth in such appeal what is required of the city or town in such detail as the committee may require.

* * * * * *

SEC. 9. When any city or town shall decide, as hereinbefore provided, to establish a plant, and any person, firm or corporation shall at the time of the vote required for such decision be engaged in the business of making, generating or distributing gas or electricity for sale for lighting purposes in such city or town, such city or town shall, if such person, firm or corporation shall elect to sell, and shall comply with the provisions of this act, purchase of such person, firm or corporation before establishing a public plant such portion of his, their or its gas or electric plant and property suitable and used for such business in connection therewith as lies within the limits of such city or town. If in such city or town a single corporation owns or operates both a gas plant and an electric plant, such purchase shall include both of such plants, but otherwise such city or town shall only be obliged to purchase the existing gas plant or plants, if it has voted only to establish a gas plant, and shall only be obliged to purchase the existing electric plant or plants if it has only voted to establish an electric plant. If the main gas works, in the case of a gas plant, or the central lighting station, in the case of an electric light plant, lie within the limits of the city or town which has voted to establish a plant as aforesaid, such city or town shall purchase as herein provided the whole of such plant and property used in connection therewith, lying within its limits, and the price to be paid therefor shall be its fair market value for the purposes of its use, no portion of such plant to be estimated, however, at less than its fair market value for any other purpose, including as an element of value the earning capacity of such plant based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant, and also any locations or similar rights acquired from private persons in connection therewith, plus the damages suffered by the severance of any portion of such plant lying outside of the limits of such city or town, and

minus the amount of any mortgage or other incumbrance or lien to which the plant so purchased, or any part thereof, may be subject at the time of transfer of title; but such city or town may require that such plant and property be transferred to it free and clear of any mortgage or lien, unless the gas or electric committee of such city or town shall otherwise determine. Such value shall be estimated without enhancement on account of future earning capacity, or good will, or of exclusive privileges derived from rights in the public streets. When any capital has been paid in, in property instead of cash, the valuation placed upon such property in estimating it as paid-in capital shall not be conclusive in estimating its value under the foregoing provisions, but may be disputed by the city or town, and if shown to have been excessive, may be reduced by the authority fixing the price of the plant and the property as hereinafter provided.

If the main gas works or central lighting station of such a plant do not lie within the limits of the city or town which has voted as aforesaid, then such city or town shall only purchase that portion of such plant and property which lies within its limits paying therefor upon the basis of value above established, but without allowance of damages on account of severance of plant. No city or town shall be obligated by this section to buy any apparatus or appliances covered by letters patent of the United States or embodying a patentable invention unless a complete right to use the same and all other apparatus or appliances necessary for such use within the limits of such city or town to such extent as such city or town shall reasonably require such right, shall be assigned or granted to such city or town at a cost as low as the cost of such right would be to the person firm or corporation whose plant is purchased.

SECTION 10. Any person, firm, or corporation, desiring to enforce the obligation of any city or town under section 9 to purchase any property, shall file with the clerk of such city or town within thirty days after the passage of the final vote whereby such city or town shall have decided to establish a plant a detailed schedule describing such property and stating the terms of sale proposed. If the parties fail to agree as to what shall be sold, or what the terms of sale and delivery in accordance with the provisions of this act shall be, either party may within sixty days after the filing of the schedule apply by petition to the circuit court having juris-

diction in said county setting forth the facts and praying an adjudication between the parties, and thereafter such court shall after giving both parties an opportunity to be heard, appoint a commission or jury as now provided by law in matters of eminent domain and the exercise of the right thereof who shall give the parties an opportunity to be heard and shall thereafter determine by their award or verdict what property, real or personal, including rights and easements, shall be sold by the one and purchased by the other, in accordance with the provisions of this act and what the price, time and other conditions of the sale and delivery thereof shall be. Such commission or jury shall file their award or verdict in the office of the clerk of the circuit court having jurisdiction for revision or confirmation by said court.

* * * * * * *

SEC. 12. Whenever the existing gas plant or electric plant of any person or corporation shall have been acquired by any city or town pursuant to the provisions of this act, the powers and rights as such person or corporation in relation to the manufacture and distribution of gas and electricity within the limits of such city or town, shall, from and after the date of such acquirement, cease and determine.

SEC. 13. All general laws of the State of Florida, and all ordinances, or by-laws of any city or town, availing itself of the provisions of this act, relative to the manufacture, use, generation or distribution of gas or electricity, or the quality thereof, or plant or appliances therefor, shall apply to such city or town so far as the same may be applicable and not inconsistent with this act, in the same manner as the same apply to persons and corporations engaged in making, generating or distributing gas or electricity therein.

SEC. 14. Nothing herein shall be construed to take away, restrict or impair any rights of any city, town or other authority which may now exist to revoke locations of wires, poles, conduits or pipes in, over or under their streets or ways: *Provided, however,* That no city or town having within its limits the main gas works, in the case of a gas plant, or the central lighting station, in the case of an electric plant, or the major portion of the wires, poles, conduits or pipes used in connection with any such works, or plants, shall except for a violation of the terms or conditions upon which

the same were granted, or for a violation of law respecting the exercise thereof, revoke any rights heretofore granted, or which may be hereafter granted to any person or corporation engaged in the business of making, generating or distributing gas or electricity for sale for lighting purposes, after the passage of the vote of the city council or town council and the vote of the electors of such city or town, as provided for in section 2 of this act.

No. 209.
Br. of Raney for Def.
Filed Mar. 10, 1902.

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Clerk.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. ~~205~~ 209.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

GEO. P. RANEY,
Counsel for Defendant in Error.

Tallahassean Job Print, Tallahassee, Florida.

Supreme Court of the United States
OCTOBER TERM, 1901.

No. 505.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

Brief of Mr. George P. Raney for Defendant in Error.

This cause was heard upon the demurrer of the Defendant in Error to the bill of complaint of the Plaintiff in Error, and there was a decree in the Circuit Court of Florida, sitting in Chancery in and for Leon county, dismissing the bill, and, on appeal, the Supreme Court of Florida affirmed such decree. The decision of the Supreme Court of Florida is reported in 28 Southern Reporter, 810, and will appear in Vol. 42 of Florida Supreme Court Reports, and is in the Transcript of the Record, pp. 27-35. Such Florida statutes as are deemed necessary to the decision of this case are printed at the end of this brief, where not set out in the body of it.

I.

The first inquiry to be made is as to the alleged exclusive rights, privilege or franchise of the Plaintiff in Error, The Capital City Light and Fuel Company. Any exclusive right

is not claimed as a matter of immediate or direct grant to itself, but as acquired by assignment from the Tallahassee Gas and Electric Light Company, through W. A. Rawls, who was a purchaser at a mortgage foreclosure sale of certain properties of the last named company.

What were the exclusive privileges or franchises of the Tallahassee Gas and Electric Light Company? Such company was a body corporate organized under a Florida statute, entitled "An Act to provide for the creation of corporations and to prescribe their general powers and duties," approved August 8th, 1868, being Chapter 1639 of Laws of Florida. Section 1 thereof provided that "any number of persons may associate themselves and become incorporated for the transaction of any lawful business of a public or private nature, including all works of internal improvement;" and, section 2, shall have succession by its corporate name for twenty years or a period to be limited in the charter of incorporation, and hold, buy and mortgage and convey such real and personal property as the purposes of the corporation may require, and as it may be necessary to acquire in order to obtain or secure any indebtedness to the company, and the other powers ordinarily incident to business corporations; and, section 10, that it shall be lawful for the president and directors, or their authorized agents, to enter upon any land or lands, *public or private*, necessary to the business contemplated in its articles of association, or to take from any lands most convenient to their works any timber, stone, earth or other materials which may be necessary for the construction of and keeping in repair its works and improvements; and, section 11, that whenever the corporation shall take possession of and use any land, timber, stone or other material *owned by private* individuals for the route and site of its works, or for the construction and keeping in repair the same, or any part thereof, and the parties can not agree upon the value of the damages sustained, the corporation may apply to the Circuit Court for a writ of *ad quod damnum;* and, section 37, it is declared that nothing contained in the act shall be construed to extend to

any county or township or to any public university, academy, seminary, school or other religious corporation incorporated by the laws of this State; and other sections provide for subscription to and increase of capital stock, stockholders meetings, and make other provisions and regulations appertaining only to business corporations. By an act of 1874, certain sections of this act were repealed, but they were re enacted by Chapter 3165, approved March 11, 1879: McClellan's Digest Laws of Florida, pp. 226-236. It is, however, upon the 38th section of this statute (which section is Section 30 on page 234 McClellan's Digest) that great reliance is placed by Plaintiff in Error for its contention. Its provisions are: "Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation; Provided, however, That this investment shall not so operate as to divest any future Legislature of those powers of government which are inherent and essential attributes of sovereignty, to-wit: the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like." This section, as well as the others mentioned above, was in force at the time of the incorporation of the Tallahassee Gas and Electric Light Company, on December 20, 1887, and when it began operations under the Tallahassee City Ordinance of January 4th, 1888, but was omitted from the Revised Statutes and ceased to be law on the 13th of June, 1892, the day the Revised Statutes became operative.

The *purposes of the creation* of the Tallahassee Gas and Electric Light Company was, as stated in the bill of complaint, to construct, maintain and operate gas works and electric light works in said city and to manufacture gas for light and fuel, or to dispose of and deal in coal or wood for fuel, and to maintain and operate electric light machinery for

supplying light in said city, or for manufacturing and dealing in any and all manner of artificial light or heat within the city.

At the same session (A. D. 1868) of the Legislature at which the above mentioned statute was enacted there was passed: "An Act to provide for the incorporation of Cities and Towns and to establish a Uniform System of Municipal Government in this State," the date of its approval being August 6, 1868, and it being Chapter 1638 of the Laws of Florida. It provided, *inter alia*, for the exercise of its system of government by existing municipalities, and repealed the charters of all that should not accept its provisions within six months. The 15th section of this statute provides: "That the City or Town Council shall have power * * * to provide for the lighting of the streets of the city or town." This act was revised at the next session of the Legislature in 1869, by an act of the same title, approved February 4th, 1869, being Chapter 1688, and the stated provision was retained in the 15th section thereof, and no change was made as to such powers, nor was any other change made in the section. The 21st section, on page 249 of McClellan's Digest, and Section 693 of the Florida Revised Statutes are the same as said section 15, in said acts of 1868 and 1869.

The stated municipal act of August 6th, 1868 (Chapter 1638), gave the city or town council (section 12) power to "regulate, improve, alter, extend and open streets, lanes and avenues, and to cause encroachments and obstructions, decayed buildings and ruins to be removed," and provided for compensation to parties injured and assessments against those benefited. The same provisions are contained in section 12 of the above act of February 4th, 1869 (Chapter 1688), and likewise in the amendment of said section 12 of the act of 1869 made by section 2 of Chapter 3024, approved March 8th, 1877, and to be found in McClellan's Digest as section 17 on page 248, and in our Revised Statutes as Section 675. The only change made in such section by the amendment of 1877 being the addition of the power to construct drains and sew-

ers. The same amending act changes the 13th section of said act of 1869 so as to make it provide that the City or Town Council shall have "power to regulate and control the grading, construction and repairs of all *streets*, pavements and sidewalks," and requires the owners of real estate within the corporate limits to construct uniform and substantial sidewalks around their several lots; but such section had, as it stood in the act of 1868, and that of 1869 contained such provisions except as to *streets*. It is to be found in McClellan's Digest, Sec. 19, p. 249, and has been retained in the Revised Statutes as Section 676.

Whatever exclusive privileges the statute first mentioned above, Chapter 1639, act of August 8, 1868, may have conferred upon the Tallahassee Gas and Electric Light Company, it can not, in view of the above provisions of the Municipal Incorporation Act passed at the same legislative session of 1868, as to the power of the City and Town Council to provide for the lighting of the streets, be held that power to light the streets of any city or town organized under such municipal legislation was intended to be given to any company that might be organized under Chapter 1639, and as the same power to make provision for lighting streets obtained in the council at the time of the incorporation of the Tallahassee Gas and Electric Light Company (December 20, 1887), no power to light the streets of Tallahassee, a city incorporated under the general municipal incorporation law of 1869, was conferred by the charter of such company. The City Council having the power to make provision for lighting its streets, the Legislature can not be held to have intended to give the power to any company that might be organized under said act of August 8, 1868. The stated provision in the municipal statute is a limitation upon the general provision of the other act. Acts passed at the same session of the Legislature should be so construed as to maintain the provisions of each, and no other construction than that contended for can give effect to the stated provision of the municipal acts.

Statutes which are *in pari materia* are to be construed

together and effect given to them, and contemporaneous legislation, not precisely *in pari materia* with any particular act to be construed, may be referred to on the question of intent.

23 Am. & Eng. Ency. of Law, Title "Statutes," pp. 311–315.
Fla., etc., R. Co. v. Pensacola, etc., R. Co., 10 Fla., 160.
Donovan, *Exparte*, 24 Fla., 281.
Ferari v. Board of Health, 24 Fla., 390.
U. S. v Freeman, 3 How., 556.
Beals v. Hale, 4 How., 37.
Huidekoper v. Douglass, 3 Cranch, 66.
Chicago, etc., R. Co. v. U. S., 127 U. S , 406.
Van & v. Newcombe, 132 U. S., 235.
Frost v. Wenie, 157 U. S., 46.
Smith v. People, 69 N. Y., 175.
In re. Rochester Water Comrs., 66 N. Y., 422.
Chase v. Lord, 77 N. Y., 18.

It will not be denied that the Legislature of 1863 was the first meeting of that body held under the Constitution of 1868 resulting from the Reconstruction Acts of the U. S Congress of 1867. That Legislature not only enacted a general law as to Municipal Corporations, Chapter 1638, *supra*, and one as to business corporations for profit, Chapters 1639, 1640, *supra*, but also one for the incorporation of Benevolent and Charitable Societies, Chapter 1641, approved August 6, 1868. This legislation was at least somewhat of a departure from old methods, and the institution of a system of general and uniform laws as to corporations, in response to the requirements of the Constitution of 1868. These statutes must be considered together in order to ascertain the intent of the Legislature as to the powers and functions of the respective bodies, or corporate entities, provided for by them severally. They were all before the same Legislature, and at the same time, and it is unreasonable to assume that each was not considered in its bearing upon the other, and as constituting a distinct part of a general system; and when there is an express and special provision in any one of them as to particular powers or functions of the class of corporations it provides for,

any mere general provision to be found in any other statute as to its class must naturally give way as subordinate to such special intent of the Legislature. Especially must this be the case where the special provision concerns a public function and duty, such as lighting the streets of a city, or the control and management of such streets. Upon the authorities cited above, it can not be held that the Legislature intended that any business corporations to be organized under Chapters 1639, 1640, should have any power to light the streets of any town or city of Florida, incorporated under such municipal statutes (as was Tallahassee), except by authority received from such city or town. Again Chapters 1639, 1640 conferred no power upon the city or town; and Chapter 1638 conferred no power on any city or town to grant to any person, whether natural or artificial, any exclusive right to light the streets.

It is also true that the power shown above to be given by such municipal statute to cities and towns as to their streets precludes the contention that the act of August 8th, 1868, Chapter 1639, gave the Tallahassee Gas and Electric Light Company any right to use the streets of the city of Tallahassee for either gas or electric or any other purposes specified in its charter. To say that it did is to say that the stated provisions of the municipal act giving the city and town council power to regulate the streets were of no effect. In view of the nature and purposes of streets, and the statutory provisions referred to above and the authorities cited in the second succeeding paragraph below it is obvious that the exclusive control of the streets was given by the municipal statute to cities and towns as against business corporations, yet that the power of control vested in cities and towns did not extend to the limit of authorizing municipalities to grant to any one any exclusive privilege as to the use of the streets for any purpose.

The policy of the law was to vest in the city or town government, not in a business corporation, or other agency, the power to provide for lighting the streets, and that of regulating the use of streets for any and all purposes; the municipal

corporation statutes of 1868, and 1869, and 1877, *supra*, invested the municipalities with such powers, and the business corporation acts, *supra*, did not vest business corporations with such powers; nor was any joint power given to the two classes of corporations whereby the power or function of the business corporation in the premises was increased.

I do not feel justified in saying that the Plaintiff in Error contends that the City Council of Tallahassee had, under the municipal statutes in operation at the time of the passage and approval of the ordinance of January 4th, 1888, any power to grant to or create in the Tallahassee Gas and Electric Light Company *exclusive* authority to construct gas and electric light works in the city, and for that purpose any of the exclusive incidental or auxiliary powers mentioned in the ordinance. It is evident both upon principle and authority that the municipal statute did not, either in providing for lighting the streets of the city or regulating the use of the streets, give any such authority to the city.

Dillon's Municipal Corporations (4th ed.), Secs. 89, 692, 693.

F. C. & P. R. R. Co. v. Ocala S. & S. R. Co., 39 Fla., 306.

Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep., 659.

Saginaw G. L. Co. v. City of Saginaw, 28 Fed. Rep., 529.

Syracuse Water Co. v. City of Syracuse, 116 N. Y., 167.

Minturn v. La Rue, 23 How., 435.

Wright v. Nagle, 101 U. S., 791.

Freeport Water Co. v. Freeport City, 180 U. S., 587.

Danville Water Co. v. Danville, Id., 619.

Rogers Park Water Co. v. Fergus, Id., 624.

Detroit Citizens Street Ry. Co. v. Detroit Railway, 171 U. S., 48.

State *ex rel.* v. Cincinnati G. L. & C. Co., 18 Ohio St., 262.

Gas Co. v. Parkersbury, 30 W. Va., 435.

Birmingham, &c., St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala., 465.
Gale v. Kalamazoo, 23 Mich., 344.
City of Newport v. Newport Light Co., 89 Ky., 454.

A power to provide for lighting the streets of a city does not confer power to authorize the manufacture and sale of either gas or electricity by others for the private use of the inhabitants of the city, and conceding that the general welfare clause, giving power "to do and perform all such act or acts as shall seem necessary and best adapted to the improvement and general interest of the city or town," to be found in section 15 of the municipal act of 1868, and section 15 of the act of 1869, and in section 21, page 249 of McClellan's Digest, and continued in the Revised Statutes, section 693, gave to the city such authority, it is nevertheless obvious from the authorities last cited that it granted no power to confer an *exclusive* right or privilege on any one to carry on any such business.

In State *ex rel.* v. Jacksonville Street Ry. Co., 29 Fla., 590 (A. D. 1892), the Street Railway Company (a horse railway) claimed, and it was conceded by the court, that by virtue of its charter it had, under section 10 of the railroad incorporation act of February 19, 1874, the power to construct its road across, upon and along any street of the city of Jacksonville without regard to the action of the City Council of Jacksonville. Such section gave express authority to construct the road across, along or upon or use any street or highway. The stated municipal act of 1869, as amended March 8th, 1877, by sections 2 snd 3 of Chapter 3024, gave the city or town council power to regulate, improve, alter, extend and open streets, lanes and avenues, to cause encroachments and obstructions, decayed buildings and ruins to be removed, and to regulate and control the construction, grading and repairs of all streets, pavements and sidewalks within the city or town limits. In the opinion of the court it is held that authority of a general nature to regulate and control the streets

usually granted to municipal bodies is generally deemed sufficient to clothe the municipal body with the right to grant or refuse or otherwise to regulate the use of the streets for street railways operated by horse power, and it is further said: "The respondent company was incorporated after the passage of the act of 1877, *supra;* and if any conflict should exist between this act and the one of 1874, upon which the defence is based, the former would control; but we perceive no conflict between them as to street railways. Conceding that the respondent had the franchise right to construct the railroad, yet the manner in which it was to be done, and the amount of contribution to be made by it to the municipal body for the maintenance of the street, in consideration of the benefits thereby derived were left by the act of 1877 to the regulation of the municipal body. Under the decisions the general powers conferred upon municipal bodies by said act to regulate and control the construction, improvement and repair of streets are sufficient to authorize them to impose such conditions as are contained in that portion of the ordinance now under consideration, and hence we conclude that the respondent company is bound thereby."

In Fla. Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla., 306 (A. D. 1897), the Supreme Court of Florida, construing the powers of cities and towns in this State over their streets, held that legislation cited above, Section 17, on page 248 McClellan's Digest, did not authorize a city organized thereunder to vest in a street railway company an exclusive right to the use of its streets.

The consideration the last two decisions are entitled to and will receive at the hands of this court is not doubtful. Burgess v. Seligman, 107 U. S., 20, Freeport Water Co. v. Freeport, *supra.*

Under the legislation referred to above and controlling in this case, and the rule of law applicable thereto and evidenced by the authorities cited, the City Council of Tallahassee had no authority to exclude other persons from making or vending gas or using the streets of the city for that pur-

pose, or to preclude itself from lighting its streets through any other instrumentality than the Tallahassee Gas and Electric Light Company or its successors. It could place no such limitation on itself or succeeding councils of the city, and for the reason that the law-making power had not given it authority to do so.

Stein v. Bienville Water Supply Co., 141 U. S., 68.
Syracuse Water Co. v. City of Syracuse, 116 N. Y., 167.
Richmond County Gas Light Co. v. Town of Middleton, 59 N. Y., 228.
Davis v. Town of Harrison, 46 N. J. (Law), 79.

If it could be claimed that the defective power of the City of Tallahassee as to granting exclusive franchises in the premises is supplemented by the charter of the Tallahassee Gas and Electric Light Company in any way, or upon the theory that such Gas Company was by its charter capable of exercising such franchises if the city would consent thereto, it is, however, fatal to any such contention that there has never been any exclusive privilege for a period so short as twenty years mentioned in the 38th section of Chapter 1639 (Sec. 30, p. 234 McClellan's Digest). The limitation of twenty years in such section can not support a longer grant from the city and renders the municipal grant for twenty-five years void.

Davis v. Town of Harrison, *supra*.

Who can say, moreover, that the City of Tallahassee would have granted such alleged exclusive privileges on the terms stated in the municipal ordinance for only twenty years. It has not spoken for itself on the point.

The power granted to the Gas and Electric Company by the statute of 1868, Chapter 1639, did not confer any power on the municipality.

Louisville & Nashville R. Co. v. Kentucky, 161 U. S., 677, 691–2.
Detroit Citizens Street Ry. Co. v. Detroit Railway, 171 U. S., 48.

In view of the municipal legislation set out above the provision of Section 38 of Chapter 1689, *supra*, gave no more authority for the exercise within a municipality of any power as to anything covered by such municipal legislation, than it would if such municipal legislation had been incorporated by apt words into said section 38, as a proviso, as in the case of the Michigan legislation construed in the case last cited; and our legislation, both Chapter 1638 and 1639, gives no power to a city or town to grant any exclusive privileges as to any matter covered by the cited municipal legislation. 171 U. S., 48.

II.

It is obvious that while the Tallahassee City Ordinance of January 5th, 1888, does show (section 1) an intention to give authority to the Tallahassee Gas and Electric Light Company to construct gas and electric light works, and for that purpose to lay pipes in any and all streets and alleys and lots of the city and erect lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in the city and to make necessary excavations and structures and run wires along the streets, it is clear there was no purpose upon the part of the city to confer, by the ordinance, a corporate capacity of any kind upon such company. It can not be contended that the city had any power to confer any such capacity; nor was the acquisition thereof a purpose of the named company in obtaining the ordinance. The sole purpose was to obtain authority from the city, through its council, for the construction by such company of gas and electric light works in the city, and to use the streets, alleys and lots of the city for the purposes and in the manner therein and above stated. The conditions to such use, imposed by the ordinance, are: (Sec. 6) that the company shall not be permitted to manufacture and supply gas of less than eighteen candle power; nor to charge private consumers exceeding $2.50 per 1,000 feet, or the city more than $30.00 for each lamp of not less than twenty candle power through burners of a capacity of four feet per hour; that (Sec. 7) the company

should file its written acceptance of the ordinance within thirty days after its taking effect, upon the filing of which acceptance the terms of the ordinance were to become binding on the city and the company. The ordinance also provides (Sec. 7) that the company shall put in and operate electric lights as soon as sufficient consumers can be secured to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights. In other sections there are provisions that in case of any violation of the ordinance by the company the City Council may in its discretion declare the ordinance null and void and repeal the same, and for a lease of a part of a piece of land lying south of the city, and known as the City Reserve, at a nominal rental, and regulations as to construction of works not necessary to notice, and then the ordinance provides (section 10) that the city "in consideration of the foregoing requirements being complied with on the part of" said company "their associates, successors and assigns shall and hereby obligates itself to take all gas which it may wish to use in lighting its streets or buildings at a price of not more than $1.50 per 1,000 feet for such as may be used in public buildings used exclusively by said city, and at a price of not more than $30.00 per annum for each street lamp as herein provided for in section 6 of this ordinance for the period of *twenty-five consecutive years from the completion of said gas works. Provided that nothing herein shall be construed as an obligation on the part of said City of Tallahassee to take any gas from said company.*" Section 11 ordains: "That the *privileges and licenses* herein and hereby granted shall be *exclusive* in and to said Tallahassee Gas and Electric Light Company, their associates, successors and assigns for and during the term of twenty-five years."

The proviso to section 10 as to not taking any gas, considered in connection with the fact of an entire absence from the ordinance of any agreement upon the part of the city to take any electric light from the company, shows that there

was no intention upon the part of the city to exclude itself from the right to supply itself through its own instrumentalities with electric light, and that it was not bound by the ordinance to refrain from doing so. This construction is in accordance with the general rule applicable to such cases, and supported by authorities, *supra*, and particularly by the cases of

Lehigh Water Company's Appeal, 102 Penn. St., 515.
Saginaw Gas Light Co. v. City of Saginaw, *supra*.
Gas Company v. Parkersburg, *supra*.
Stein v. Bienville Water Supply Co., *supra*.
City of Newport v. Newport Light Co., *supra*.

The city had no power to create any exclusive franchise as to any "*privileges*" or "*licenses*," and we find, moreover, from the ordinance itself, that the city has expressly exempted itself from any obligation to take gas and has not agreed either to take electricity from the grantee or not to use electricity, and it is consequently clear that the complainant can have no right to an injunction to restrain the city from erecting an electric plant, or using electricity supplied by itself or from other sources, and this is true independent of the legislation of 1897 and 1899 commented upon hereafter. *Vide* authorities last cited, *supra*. The city not having agreed to take any gas from the grantee company or its successors and assigns, and not having agreed to take any electricity from them, and not having agreed not to use electricity for lighting purposes, can not be held to have intended or been understood to part with its rights and duty to light the streets, and to do all things necessary therefor. The power to light the streets carried with it the choice of means to accomplish that end. Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla., 271.

And again there is in the ordinance no contract or agreement that the Tallahassee Gas and Electric Light Company should have the exclusive right to supply the inhabitants of, or private consumers in, the City of Tallahassee with either gas

or electircity, or that such inhabitants or consumers should take gas only from such company or its successors or assigns, and not from any other company or agency that might manufacture it either within or without the city; and there is no agreement that no other company or agency should sell gas to private consumers in the city or electricity to either the city for public purposes or to private consumers. The regulation as to candle power of gas, and maximum prices to be charged do not constitute restrictions upon the rights of either manufacturers, or of purchasers or consumers. There being an absence of all these agreements and guarantees (none of which the city had any authority to make), and the city having exempted itself from any obligation to take any gas, and not having agreed to take any electricity for its own use, and not having agreed not to use electric light, and it having no authority to grant the exclusive use of its streets, alleys or lots for the purposes of constructing gas or electric light works, or for any of the incidental purposes mentioned in the ordinance, there is, consequently, nothing in the ordinance that is an obstacle to the supplying either itself or other consumers with electricity under the legislation of 1897 and 1899 and the ordinance of 1899, adopted pursuant to such legislation. If there is, then the city has debarred itself from using during the period of twenty-five years either gas or electricity not furnished by the named company or its successors, without having so agreed, and without having any authority to give any exclusive license or privilege it has attempted to give.

It seems then that the case at bar is not one in which the City of Tallahassee has agreed that it would not become a competitor with the Tallahassee Gas and Electric Light Company, and it is clearly distinguishable from that of Walla Walla City v. Walla Walla Water Co., 172 U. S., 1, cited by plaintiff in error. In that case there was an express agreement that the city would not erect, maintain or become interested in any waterworks, but the city reserved the right to

condemn and pay for the water rights and works of the company or of any company at any time (pp. 5. 17–18). This agreement was held to be within the power granted to the city by its charter to provide a sufficient supply of water and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a term not exceeding twenty years; and not to violate the *proviso* that none of the rights or privileges granted should be exclusive or prevent the council from granting such rights to others (pp. 14, 17, 18). It is, however, said in the opinion (p. 14) that had the privilege granted by the ordinance been an exclusive one the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the Legislature to that effect. In the case at bar while there is no authority whatever in the city charter to grant any exclusive privileges, the ordinance has undertaken to grant some, but the city authorities, either by accident or design, have effectively excepted the city from them; and in the Walla Walla case, while there is an express negation of any authority to grant any exclusive rights the city expressly debarred itself from becoming interested in any waterworks except after having exercised the power of eminent domain against such company as to its water rights and works.

III.

Such being the status and rights of the Tallahassee Gas and Electric Light Company, we are brought to a construction of the rights of the Capital City Light and Fuel Company, the Plaintiff in Error claiming, through W. A. Rawls, who purchased on the 5th day of February, 1894, under a decree of foreclosure and sale rendered January 4th, 1894, in a suit in equity wherein Wm. M. McIntosh, Jr., as trustee, was complainant, and the Tallahassee Gas and Electric Light Company was defendant, in the Circuit Court of the Second Judicial Circuit of Florida in and for Leon county. The allegations of the bill of complaint are that by virtue of a decree

of foreclosure and sale made on said 4th day of January, "all lands belonging to said Tallahassee Gas and Electric Light Company, with the tenements, hereditaments and appurtenances thereon and thereunto belonging, or in anywise appertaining, and also the plant, machinery and attachments thereto, whether movable or immovable, or whether pertaining to the realty or personality, and the corporate franchise of said oompany, and all claims of property, real, personal and mixed, of said company then owned by it," were offered for sale to the highest bidder on said 5th day of February, and on being so offered were bought by said Rawls, and a deed was made to him therefor by the Master in Chancery in said cause; and that thereafter on March 19th, 1894, the Capital City Light and Fuel Company, was duly incorporated under the general incorporation laws of the State of Florida. The "general nature of the business to be conducted" by such corporation is stated in the bill to be ("as expressed in its articles of association") "to acquire, construct, improve, maintain gas works and electric light works *in and adjacent to* the City of Tallahassee, in Leon county, State of Florida; and to manufacture gas for light and fuel, to dispose of and deal in coal or wood for fuel; to construct, maintain and operate electric light machinery for supplying light in and about such city, or for manufacturing and dealing in any and all manner of artificial light or heat."

It is also stated in the bill that such company was incorporated with the purpose and intent of acquiring and operating under the terms and provisions of said ordinance of the City of Tallahassee, the said property so purchased by the said Rawls under the decree aforesaid, and said property was purchased by Rawls with the intent and purpose of transferring it to said company for such purposes, and that in performance of such intent and purpose the said property was made over by him to said company and the company at once entered into possession and assumed the management and control thereof and continued the manufacture of gas for pur-

poses of supplying said city and its inhabitants with light and heat, and has since coming into possession thereof enlarged and extended its plant to meet the increased demands of said city and its inhabitants, and the city has ever since recognized, treated and dealt with the Plaintiff in Error as the lawful successor of said Tallahassee Gas and Electric Light Company, and the legal assignee of all the rights and franchises, privileges and contracts created and conferred on said last named company by said ordinance of the City of Tallahassee.

There are two aspects in which the rights of the Capital City Light and Fuel Company, the Plaintiff in Error, are to be considered.

The first is what are its rights and powers in the premises by virtue of its articles of incorporation, or charter of March 19th, 1894.

As stated at the outset of this brief, the 38th section of the act of August 8th, 1868, Chapter 1639 (Sec. 30, p. 234 McClellan's Digest) was not retained in the Revised Statutes, but ceased to be operative upon such Revision becoming effective on June 13, 1892, which was nearly two years before the incorporation of the Plaintiff in Error, and over eighteen months before the decree of sale, and over nineteen months before the sale to Rawls. By section 1652 of the Revised Statutes it is provided that "whenever the use of any street, square or public way, or any part thereof, within an incorporated city or town or provisional municipality is required by any corporation for public use the right to use such street, square or public way, or any part thereof, shall be granted only by the Mayor and Board of Aldermen of such city or town or by the commissioners of such provisional municipality." In the light of authorities, *supra*, this confers no power to create or grant any exclusive rights or privileges. Moreover, on the 2d of June, A. D. 1893, some months prior to such decree, sale and incorporation, there was passed an act, Chapter 4166, which took effect sixty days after the day of adjournment of the Legislature (such adjournment being on June 2d,

1893), authorizing the Council of any city or town to enter into an agreement with gas and electric light or waterworks companies for lighting the streets or constructing and operating waterworks in such city or town, such act having a *proviso* that any such agreement must be ratified by a majority vote of the freeholders voting at an election to be held for that purpose, and an additional *proviso* not necessary to mention here. See also Section 680, Revised Statutes of Florida, reproduced from an act of March 11th, 1879.

By the stated repeal of such 38th section there was an entire elimination of ever ground for any pretence of an exclusive privilege attaching as a corporate franchise to the Capital City Light and Fuel Company by virtue of its corporate being, or to any other business corporation organized subsequent to such repeal under the laws of Florida, and this, too, independent of the alleged effect of the municipal corporation statutes cited above; and the Capital City Light and Fuel Company having been organized subsequent to said act of June 2d, 1893 (Chapter 4166), there could be no binding contract between it and the City of Tallahassee for lighting the streets, or for constructing and operating water works in the city in the absence of a compliance with the terms of Chapter 4166. After Chapter 4166 went into effect, which it did on August 1st, 1893 (the Constitution of Florida, Sec. 18 of Art. III, providing that no law shall take effect until sixty days from the final adjournment of the session of the Legislature at which it was enacted unless otherwise specially provided in the law, and that session having adjourned on June 2, 1893), there was no power in any town or city in Florida to enter into any binding contract of the character stated without a ratification thereof by a majority vote of the freeholders. In a word, it is safe to assert that the appellant company had no exclusive rights or powers in the premises by virtue of its charter of March 19th, 1894.

The second aspect in which the appellant company's rights and powers in the premises are to be considered is as the assignee of Rawls.

The proposition as put by counsel for Plaintiff in Error is: Did the franchise of the Tallahassee Gas and Electric Light Company to operate gas and electric light works in the City of Tallahassee and the exclusive right to this privilege pass under the foreclosure sale to Rawls, and from him to the Capital City Light and Fuel Company, under his deed of transfer or assignment?

It is not contended on behalf of Plaintiff in Error that the sale to Rawls vested him with the franchise of being a corporation, or with the name and the essentials to the entity of the Tallahassee Gas and Electric Light Company. Rawls did not either become a corporation, or become vested by the sale with the general corporate powers of the old company. Thompson on Corporations, Secs. 5352-5355, 5368, 5370, 5373, 5374. The contention is that the right to lay and keep its pipes in the streets of the city and all the company's property and the right incident to the property to use it for the purposes for which it was designed and adopted, and the exclusiveness of such right, passed to Rawls and from Rawls to the Plaintiff in Error.

Before dealing with this contention it is well to state exactly what property, as shown by the pleadings, did pass to Rawls, and from him to the Plaintiff in Error. The bill of complaint (pages 3 and 4 of the transcript) says: That the "Tallahassee Gas and Electric Light Company *constructed its gas works* under and in conformity to the terms and provisions of its charter and the ordinance aforesaid, and began and continued the operation of the same by virtue and in pursuance thereof, and exercised * * all and singular the powers, rights, privileges, licenses and franchises granted to or conferred upon said company by the law of its incorporation and the ordinance of the City of Tallahassee aforesaid, including the contract for lighting the streets and buildings of said city at the price and on the terms provided, until about November 8th, A. D. 1893, when all and singular *the gas works, plant and property of every kind and character of said company* were taken possession of by a receiver" appointed by

the proper Circuit Court of the State in a named cause;" and "by virtue of a decree of foreclosure and sale made" therein on the 4th day of January, 1894, "*all lands belonging to the said Tallahassee Gas and Electric Light Company, with the tenements, hereditaments and appurtenances thereon, and thereunto belonging or in anywise pertaining, and also the plant, machinery and attachments thereto, whether movable or immovable, or whether pertaining to the realty or the personalty and the corporate franchise of said company, and all classes of property,* real, personal and mixed of *said company then owned by it were offered for* sale on the 5th day of February, A. D. 1894," and on being so offered were bought by and conveyed to said Rawls, who subsequently made over the same to the Plaintiff in Error, which had, in the *interim*, on March 19th, 1894, been incorporated under the laws of Florida, for the purposes above indicated; said property having been purchased by Rawls with the intent and purpose of transferring it to Plaintiff in Error, which had been incorporated with the purpose and intent of acquiring and operating such property under the terms and provisions of said ordinance.

From the above statement, it can not be inferred that the Tallahassee Gas and Electric Light Company had constructed anything but *gas works* prior to either the seizure or sale mentioned; or that anything but a gas plant was seized or sold. The allegation of the bill (p. 8 of Transcript) that "there has never been a time since the establishment of said gas works in said city that your orator or its predecessor could have procurred sufficient customers to pay eight per cent. interest per annum on the additional capital required to purchase the machinery for and put into practical operation an electric lighting system in said city," considered in connection with the next preceding and next succeeding paragraphs of the bill, and with the 7th section of the ordinance (page 12 of Transcript) precludes the assumption that there was any electric plant in existence either at the making of the mortgage or the time of the sale to Rawls. If there was ever any "con-

tract for lighting the streets and buildings of said city" even with gas entered into between the city and either company the terms and duration of the same are not shown; and it is obvious that the ordinance does not of itself constitute a contract between the city and even the old company for taking any gas, its only purpose being to regulate certain features of any contract the city and company might subsequently agree to, *viz:* quality of gas, maximum charge, etc. Such being the case, the only property acquired by Rawls and transferred by him to the Plaintiff in Error was such gas plant as the Tallahassee Gas and Electric Light Company may have had at the time of such seizure and sale, including any real estate constituting a part of the same. As the assignee of Rawls the Plaintiff in Error took the stated property and none other. It purchased no electric light plant, there being none sold, and the old company never having had any to be seized or sold.

The Tallahassee Gas and Electric Light Company had no power to mortgage its corporate franchises, but, as is, in effect, admitted on page 20 of brief of counsel for Plaintiff in Error, power to "mortgage" only "such real and personal estate as the purposes of the corporation shall require not exceeding the amount limited in its articles of incorporation." Such is the language of the law under which it was formed. Sec. 3, p. 228 McClellan's Digest. Its articles of incorporation (pp. 10-11 of Transcript) provided that it should "hold, * * mortgage, and otherwise dispose of all realty and personalty as may be necessary for the purposes hereinafter explained."

Any mortgage, or any decree of foreclosure and sale, that included "the corporate franchises of the company," and any pretended sale of any such franchises, if there ever was any, were severally illegal and void.

Thompson on Corporations, Secs. 5352, 5353.
Morawetz on Corporations, Sec. 932.
Butler v. Rahm, 46 Md., 541.
Feitsam v. Hay, 122 Ill., 293.
Pullam v. C. & C. A. L. R. Co., 4 Biss., 35.

The only franchise that passed to Rawls or from Rawls to the new company, the Plaintiff in Error, was the right and power to apply the gas plant property, purchased and conveyed, to the uses for which it was intended and adapted and thereby make it productive and beneficial to the owner; the right and power necessary to the maintenance and operation or use and the beneficial enjoyment of the property.

Morawetz on Corporations, Sec. 932.
Thompson on Corporations, Secs. 5354, 6236.
Morgan v. Louisiana, 93 U.S. 217, 223.
Memphis R. Co. v. Commissioners, 112 U. S., 609, 619.
New Orleans, etc., R. Co. v. Delamore, 114. U. S., 501.
Eldridge v. Smith, 34 Vt., 484, 490, 491.
Atkinson v. Marietta, etc., R. Co., 15 O. St., 21, 36.
Wright v. Milwaukee & S. P. Ry. Co., 25 Wis., 46.
City of Menosha v. Milwaukee & N. R. R. Co., 52 Wis., 414.
Meyer v. Johnson, 53 Ala , 237.

Rawls did not purchase or convey any other than gas plant property; he obtained no electric plant property, and no franchise as to any electric plant property.

Again, there was no obligation incurred by Rawls to carry out the undertaking of the Tallahassee Gas and Electric Light Company under the 7th section of the ordinance (p. 12 of Transcript) to put in and operate an electric light plant. This obligation is confined by its terms to the last named company, and is also personal in its character, and did not run with or attach as a lien or burden upon the property of the company, and would not have bound Rawls, or other such purchaser at a foreclosure sale, or his assigns, had the stated section by its terms made the obligation binding upon the "successors and assigns" of the original company.

Wright v. Milwaukee, etc., R. Co., *supra*.
City of Menosha v. Milwaukee & N. R. R. Co., *supra*.
People *ex rel.* v. Louisville & Nashville Ry. Co., 120 Ill., 48; S. C., 10 N. E. Rep., 657; S. C., 5 N. E., 379.

The foreclosure sale did not dissolve or destroy the Tallahassee Gas and Electric Light Company. Thompson on Corporations, Sec. 5370. This being the fact, and the status of the property of that company at the time of the sale being as above indicated, and Rawls having taken no electric plant property nor any franchise except that of the beneficial use of the gas plant property which he purchased, it follows that if there is any franchise as to an electric light plant under Section 38 of Chapter 1639 anywhere, it remains in the Tallahassee Gas and Electric Light Company.

The allegations of the bill as to the status of the property of the old company at the time of the foreclosure and sale, are not sufficient to sustain conclusions any more favorable to Plaintiff in Error than have been reached under this subdivision of this brief, and the court will on demurrer to the bill take judicial notice of the legislation which we have invoked. Louisville & Nashville Railroad Company v. Palmes, 109 U. S., 244.

The Capital City Light and Fuel Company having been organized after the repeal of Section 38 of Chapter 1639, and under a system of laws which does not pretend to give or permit the giving of any such exclusive franchises, it has no exclusive franchises of the character claimed, and could not acquire any from any source other than the Legistature.

Trask v. Maguire, 18 Wall., 391.
St. Louis, &c., Ry. Co. v. Berry, 113 U. S., 465.

Chapter 4052 of the acts of 1891, invoked by Plaintiff in Error, does not seem to call for further comment than that it is not susceptible of a construction giving it a purpose to increase the powers of any municipality as to granting a right or franchise to use streets, but on the contrary the act is entirely remedial of abuses by any gas, electric light and other companies of any such grant, as shown by its context and its titles; such title being: "*An Act providing for the forfeiture of franchises, grants, rights, privileges, licenses and immunities in certain cases.*" The act provides for taking away, and not for granting franchises, etc.; and in view of

its title and of section 16 of Art. III of the Constitution of Florida which provides that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, *which subject shall be briefly expressed in its title*," any provision of the latter or granting character would be void. State *ex rel.* v. Palmes, 23 Fla., 610.

IV.

The Supreme Court of Florida in the case at bar (pp. 27–35 Transcript, 28 South. Rep., 810) has held that the municipal statutes cited above do not authorize a city to grant an exclusive privilege for the use of streets for supplying gas or electricity to the city or its inhabitants by corporations authorized to manufacture gas or electricity; and that Section 38 of Chapter 1639, the business corporation act (Section 30, p. 234, McClellan's Digest) did not confer any power on cities or towns, or supplement the powers conferred by the municipal legislation referred to. The court also holds that the exclusive privileges granted by said section 38 did not attach to a corporation organized under Chapter 1639, until the corporation had been put into successful operation, and that where a company incorporated under such chapter was organized, as shown by its charter, to engage in more than one kind of business, the fact that it erected a plant and engaged in one of the kinds of business did not vest it with exclusive privileges as to the other kind, in which it never engaged, so as to preclude the Legislature from authorizing another, municipal or private, corporation to engage in the latter kind of business; and as sustaining this conclusion, upon the authorities cited by the court, it is opportune to refer at this juncture to the statement which has just been made, under the next preceding subdivision of this brief, of the status of the property or plant of the Tallahassee Gas and Electric Light Company, as shown by the bill of complaint in this cause, at the time of the filing of the bill of foreclosure and of the sale to Rawls.

V.

As has been shown above, the 38th section of Chapter 1639 expressly declares, by a proviso, as a limitation upon its exclusive privilege feature, that "this investment shall not so operate as to divest any future Legislature of those powers of government which are inherent and essential attributes of sovereignty, to-wit: The power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like."

We are unable to see that freedom of legislation as to lighting municipalities and as to the use of streets for such purposes are not severally as inherent and essential attributes of sovereignty as anything specified in the above "proviso," or that they are not included in "the like" classification, or that the specification as to providing "safe and convenient ways for the public necessity and convenience" does not incidently include the control of streets for any and all purposes, whether it be as to their use for lighting a municipality or otherwise; but however this may be the statutes of 1897 and 1899 (Chapter 4600, approved June 5, 1897, and Chapter 4875, approved May 27, 1899) are in view of the *eminent domain features of* the said act of 1897 clearly within the reservation of such proviso as to taking "private property for the public use."

The city ordinance being without authority and of no effect in so far as the granting of any exclusive privilege to establish an electric plant or furnish the inhabitants of Tallahassee with electric light, it did not limit the power of the Legislature to lawfully enact the stated statutes of 1897 and 1899, and upon the enactment of the statutes of 1897 and 1899 the policy and provisions of such statutes became available to the city of Tallahassee if it should see fit to use them, which, as shown by the bill, it is now proceeding to do. In acting under such statutes the city is simply following the law governing such cases and the unauthorized exclusive privilege

feature of the ordinance of the City of Tallahassee of January 5, 1888, is no obstacle (even if it would be if valid) to the enforcement of such statutes. That such legislation makes full provision for the compensation of all parties claiming to have an electric plant, or a gas plant where one of the same kind is sought to be established by a municipality, is shown by sections 9, 10, 11, Chapter 4600, and section 1 *et seq.* of Chapter 4875. The Plaintiff in Error has not invoked the protection of the provisions of said Chapter 4600 as to the valuation and compensation of and for any electric plant properties, but, on the contrary, has, by the course it has pursued in protesting against and in resisting in the courts the establishment of an electric plant by the City of Tallahassee under such legislation of 1897 and 1899, elected not to sell, nor to take any conpensation for, any electric plant, if it has any; and, without ever pretending that it has any electric plant, has chosen to rely upon what it deems its exclusive right to establish an electric plant within and vend electric light to the inhabitants of said city, and the invalidity of any claim upon the part of the city of the right to establish such a plant or to vend such light under said statutes of 1897 and 1899.

Section 9 of Chapter 4600, to be found on pages 34 and 35 of the brief of Plaintiff in Error, shows the rules of valuation prescribed by such statute for the valuation of any plant to be taken thereunder, and section 10, on pages 35 and 36 of said brief, and section 11, to be found at the end of this brief, show the procedure controlling where the owner of a plant is willing to sell his property and also that where such owner and the municipality can not agree as to what shall be sold or the terms of sale; and so much of Chapter 4875 as is material to this case is to be found at the end of this brief.

As in the absence of an exclusive contract right in the Plaintiff in Error to establish and maintain an electric plant and vend electric light, the fact of an exclusive contract right in it to establish and maintain gas works and vend gas is not a bar to the grant to or the exercise by another of the right to

establish and maintain an electric plant, and vend electric light (as shown by authorities, *supra*); so it must be true that the mere impairment or destruction of the value of a gas franchise or business through the competition resulting from the establishment of an electric light plant and business, would be no obstacle to the grant or establishment of the latter business in the absence of a prior valid grant of an exclusive right to the latter or of a prior valid contract not to grant or establish an electric plant or business.

Charles River Bridge v. Warren Bridge, 11 Peters, 420.
Turnpike Co. v. State of Marvland, 3 Wall., 210.
Piscataqua Bridge v. New Hampshire Bridge, 7 N. H., 35.

The same principle sustains the legislation of 1897 and 1899 now relied on, and particularly where, as in the case at bar, it is not shown by the bill of complaint that any electric plant or business had ever been established at the time of the practical application or enforcement of such legislation, to say nothing of the necessity for the establishment of the same at the time of the foreclosure proceedings.

There is, morever, nothing in the bill that shows any deficiency, in the above legislation, of provision for adequate compensation to Plaintiff in Error for any properties or conditions incident to it. If it had possessed any electric plant and there was anything in the condition or situation of such plant that rendered the compensation provisions of such legislation indequate it was the duty of the complainant to have presented such facts in its bill. It is a conclusive presumption for all purposes of this hearing that complainant has submitted in its bill every fact it had to sustain its prayer or entitle it to relief. If such legislation is invalid it is because it is taking private property without the "just compensation" required by section 12 of the Bill of Rights of the Constitution of the State of Florida, but no statute will be adjudged

unconstitutional at the application of a party whose rights are not shown to be affected by its enforcement.

Cooley's Constitutional Limitations (6th ed.), 196.
Jones vs. Black, 48 Ala., 540.
Smith v. McCarthy, 56 Pa. St., 359.
County of Franklin v. State, 24 Fla., 55.

Special legislation, like Chapter 4875, is not contrary to our Constitution. State *ex rel.* v. County Commissioners, 24 Fla., 483, construing Section 8 of Art. 8 of Florida Constitution.

VI.

As no other relief than an injunction is prayed by the bill, and the bill does not make out a case entitling complainant to any relief, a dismissal of the bill was proper practice.

Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla., 229.

In conclusion, it is respectfully submitted that there is no error in the decree of the Supreme Court of Florida, affirming that of the Circuit Court dismissing the complainant's bill.

GEO. P. RANEY,
Counsel for Defendant in Error.

Parts of Statutes Material to the Decision of this Case.

Section 693 of Revised Statutes of Florida:

693. Wharves, vessels, bridges, ferries, fires, improvements.—The city or town council shall have power to construct wharves, quays and docks; * * * *to provide for the lighting of streets of the city or town;* to inclose and improve such public squares or parks as may adorn the city or town and to improve and beautify the public cemetery for the burial of the dead, *and to do and perform all such other act or acts as shall seem necessary and best adapted to the improvement and general interest of the city or town.*

Section 675 of Revised Statutes of Florida.

675. Powers as to streets, sewers, ruins, etc.—The city or town council shall have power to regulate, improve, alter, extend and open streets, lanes and avenues, to cause encroachments and obstructions, decayed buildings and ruins to be removed; to construct drains and sewers, and make to the parties injured thereby such reasonable compensation, and charge upon those benefited such reasonable assessments as may be agreed upon by said council and the said party or parties; and in case no such agreement can be made, then the council shall appoint five discreet persons, holders of real estate in said city or town, to ascertain and fix on the one hand a fair and equitable assessment, and on the other a just compensation, and that the said assessment shall be a lien on the real estate improved and assessed, and that every person who enters his particular drain into the main drain, or common sewer, and receives a benefit thereby from draining his land, shall pay to the city or town his proportional part of making or repairing the same.

This section is also referred to on page 9 of this brief as section 2 of Chapter 3024.

Section 676 of Revised Statutes of Florida:

676. Streets, pavements and sidewalks.—The city or town council shall have power to regulate and control the grading, construction and repairs of all streets, pavements and sidewalks, and to require the owners of real estate within the corporate limits to construct uniform and substantial sidewalks around their several lots, and to keep the same in repair; and upon failure to do the same within the time and manner prescribed, the said council may have the same done, which shall be a lien against said lots, which lien may be enforced in the manner provided in section 691.

This section is also referred to on page 9 of this brief as section 3 of Chapter 3024.

Section 680 of Revised Statutes of Florida:

680. Parks, streets, etc.—The city or town council is further authorized and empowered to lay off such parks, streets, avenues, lanes, highways, canals, etc., as may seem necessary and expedient for the public health or interest; and to open, fill in, grade, pave, dig, dredge, widen, deepen and otherwise extend, enlarge, change and improve the same. And said city or town council shall have power and authority to alter, widen, fill in, grade, pave, or discontinue any park, street, avenue, alley, highway or any other way which has heretofore been laid out, fixed or established.

Chapter 4600, approved June 5th, 1897, is, in so far as it is material to this cause, printed at the conclusion of the brief of Plaintiff in Error, except section 11, which is as follows:

SEC. 11. Any party aggrieved by the award or verdict of the commission or jury may within fourteen days after its filing or within such longer time as the court may allow, file objections thereto with the clerk of said court and apply to the court for a hearing on such award or verdict relative to any matter of fact or law pertaining to the same, and thereupon the court shall make and render its final judgment in th premises after due notice to all parties in interest and an opportunity given to be heard in the premises. The judgment

of the court upon said award or verdict shall be final and binding, and said court shall have jurisdiction as in equity to compel compliance therewith, and may also issue and enforce such interlocutory decrees and orders as justice may require. Any party aggrieved by the final judgment of the Circuit Court may have a writ of error as in common law cases to the Supreme Court of the State, subject to all the rules and laws in force in this State relating to writs of error.

Sections 1, 2 and 3 of Chapter 4875, approved May 27, 1899, are the only parts of such Chapter material to this case, and are as follows:

CHAPTER 4875.

SECTION 1. That the City of Tallahassee, in this State, may, under the limitations provided in said Chapter 4600 of the Laws of Florida, approved June 5, 1897, above stated, exercise the powers provided for in said act in the manner set forth in said act, except that where the provisions hereinafter set forth are inconsistent with those provided in said act, then the provisions of this act shall control.

SEC. 2. That said City of Tallahassee may at any regular meeting of its City Council, or at a special meeting duly called for such purpose, pass a resolution declaring that it is expedient for such city to exercise the authority or any authority granted by section 1 of said act, approved June 5, A. D. 1897, but a vote of a majority of such Council shall be necessary to pass such resolution, and such resolution shall receive the approval of the Mayor, or in case of his disapproving the same it shall be passed over his veto by a two thirds vote of the Council. Such resolution shall provide for the submission to the registered voters of the city, residing therein and who own real estate therein and have paid their taxes for the year last due thereon, the question of the ratification of such resolution at a regular election or at a special election to be called and held for that purpose; and a majority of the votes cast at such election shall be necessary to such ratification; such election to be called and held and the electors registered and returns

thereof made in the manner hereinafter provided for in case of an election upon the question of the issue of bonds. When the result of such election is against such ratification, no similar resolution shall be submitted for ratification until after the expiration of one year thereafter. A majority vote in favor of such ratification shall establish the right of the city to exercise the power to construct, purchase, lease and establish and maintain within its limits, one or more plants for the manufacture and distribution of gas and electricity, or either, for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, as provided in Section 1 of said Chapter 4600 of the Laws of Florida.

SEC. 3. If said City of Tallahassee shall vote to construct or purchase or lease, and to establish and maintain within its limits any such plant as above provided for, or for reconstructing and enlarging the same, as provided in the fifth section of said act, approved June 5, A. D. 1897, it may pay for the same by the issue of bonds of the city payable within a term of not exceeding thirty years, and bearing interest at a rate not to exceed 5 per cent. per annum. Such bonds shall not be disposed of for less than par and accrued interest; and the indebtedness thereby created shall not be included in the limit of indebtedness of the said city now provided by law; but such bonds shall not be issued until an ordinance authorizing their issue shall have been adopted by the City or Town Council at a regular meeting or at a special meeting called for such purpose, which ordinance shall specify the purpose for which such bonds are to be issued, and the maximum amount of the issue, and the time of their maturity and the rate of interest, and when and where the same shall be made payable, nor until such ordinance shall have been ratified by a majority of the vote of the registered voters of such city, voting at an election to be called for the purpose of taking the sense of such voters on such question and possessing the property qualifications hereinbefore provided. The City Council shall provide for the registration of such voters by a registration to be

closed at least five days before such election, and for returns of election.

Before any election shall take place under this section, such ordinance shall be published once during each week for three consecutive weeks in a newspaper published in said city. And there shall be a similar notice giving the time and polling place of such election. The inspectors of the election shall be chosen by the City Council. The whole amount of bonds authorized to be issued shall not exceed at their par value the amount of seven per centum of the total valuation of real and personal property within the limits of said city according to the last preceding valuation of the same made by said city authorities.

The interest on said bonds, and the sinking fund to meet the principal of the bonds at maturity whenever such bonds may be called, shall be provided for by ordinance. If it shall be deemed expedient, the City Council may at the same meeting at which it shall have passed the resolution provided for in the second section of this act, or at a subsequent meeting, provide for submitting the question of the proposed issue of bonds to the voters having the qualifications prescribed by this act; and the election as to the ratification of such resolution and that for the ratification of the ordinance authorizing the issue of bonds may be held at the same time and place and under the same inspectors.

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No. 209.
Sup. Ct. of Raney & C.
Filed Mar. 26, 1902.

Office Supreme Court U. S.
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MAR 26 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. ~~205~~ 209.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

SUPPLEMENT TO BRIEF.

GEO. P. RANEY,
Counsel for Defendant in Error.

Tallahassean Job Print, Tallahassee, Florida.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 505.

CAPITAL CITY LIGHT AND FUEL COMPANY,
Plaintiff in Error,

vs.

CITY OF TALLAHASSEE, Defendant in Error.

Supplement to brief of Mr. George P. Raney, for Defendant in Error.

There are four cases cited by counsel for plaintiff in error, to which it is proper to give more special attention than I have given them in the principal brief for the defendant in error. They are Bailey v. City of Philadelphia, 39. L. R. A. 837; Illinois Trust & Savings Bank v. Arkansas City, 34 L. R. A. 518; Atlantic City Water Works v. Atlantic City, 39 N. J. Eq. 369; Southwest Mo. L. Co. v. City of Joplin. 101 Fed. Rep. 23.

In the case of Bailey v. City of Philadelphia, there was an express agreement upon the part of the city that it would "*do nothing by ordinanee or otherwise, which will in any way interfere with, or limit, restrict, or imperil, this exclusive right hereby vested in said United Gas Improvement Com-*

pany, its successors or assigns." It is said in the opinion: "All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to be exclusive so far as it is concerned shall be limited or interfered with. This was clearly within its power in dealing with its business property." As distinguishing this case and the one at bar it will be observed: That the grant in the case at bar was for the use of streets, for the purpose of gas and electric plants, which streets are beneficially the property and for the use of *all people* who may desire to use them, and was not the lease of a gas or other plant which was the property of the city in its private or business capacity: and there was no such non-interference covenant upon the part of the City of Tallahassee. It is a peculiar and distinguishing feature of the Tallahassee ordinance that there is not only no such *non-interference covenant*, nor any agreement to take either gas or electricity for city purposes, or that the inhabitants should take either for their own use, but there is an express proviso that the city should not be understood as agreeing to take any gas at all if it did not desire to use gas. It was the purpose of the city authorities to limit the right of the Tallahassee Gas and Electric Light Company, in so far as the vending of either gas or electricity was concerned, to an implied or incidental right of sale subject to competition from any and all sources. The city not only did not attempt to bind its inhabitants to take either gas or electricity from the last named company, its successors or assigns, but it had no power to so bind its inhabitants.

In Illinois Trust and Savings Bank v. Arkansas City the questions were simply whether or not an invalid exclusive feature of a grant by a city of use of streets could be successfully interposed to defeat paying rents for the use of hydrants furnished the city under a contract otherwise valid, and whether a city council could make a contract for a water supply for a term extending beyond the terms of its members. The case is not in point as controlling the case at bar.

The case of Atlantic City Water Works Company v. Atlantic City *et al.*, is one in which the chancellor, who had granted a temporary injunction or "stay," against the city's giving to others than complainant the right to lay pipes for furnishing water to the city and its inhabitants, expressed, *on granting a motion of the city to dissolve* the same, an opinion, that whether, or not, the city's grant to the complainant company of the exclusive privilege of furnishing water to the city *and its inhabitants was ultra vires and void* as creating a monopoly, the city had, so long as the company should continue to supply water, according to contract, exhausted its power as to providing a water supply; and further that the complainant's franchise was exclusive and the court would protect, by injunction, the complainant against any invasion of its rights by persons laying water pipes, *etc.*, under municipal authority, to compete with complainant. The motion of the city to dissolve was granted in the following language: "So long as the company shall continue to supply the city with pure and wholesome water at reasonable rates it will be entitled to protection against unlawful competition. It is not necessary to that protection, however, to prevent the city from granting permission to others to lay pipes. The remedy is to restrain such persons, whether natural or artificial, from availing themselves of the permission, to the prejudice and injury of the complainant. The motion will be granted."

It is respectfully submitted that if the statute of New Jersey did not authorize the city to grant to the company an exclusive right to supply water to the city and its inhabitants, the opinion of the chancellor is not sustained by the current of authorities controlling the question in like cases where there is a new grant to third parties In the absence of power to grant an exclusive right there can not be an exhaustion of the power.

In Southwest Mo. L. Co. v. City of Joplin, the distinguishing feature of the decision is "*that the city having adopted the alternative method of procuring light for the city and*

its inhabitants contemplated by the statute, it was an implied term of the contract, made by the acceptance of the ordinance, *that the city would not itself enter into competition with the grantee in supplying lights to private consumers during the term of the grant by means of a light plant erected under the powers conferred by the statute.*"

In view of the feature of the Tallahassee ordinance, pointed out above in discussing Bailey v. City of Philadelphia, it can not be held that there was any room for the implication that the city would not supply itself as a body corporate, or its inhabitants, with electricity, or that such inhabitants should not take either gas or electricity from other sources or should be required to take either from the Tallahassee Gas and Electric Light Company or its successors. The city had the right to commence supplying itself with electric light or any other illuminating agency than gas at once, or to have continued using oil or whatever other means of illumination it may have been using at the time the ordinance was passed or accepted. It could have established an electric light plant itself for the purpose stated. It had no power to provide for furnishing light to the inhabitants for their private or domestic purposes, and for the reason that the grant of power to it as to lighting the city, was only "to provide for the lighting of the streets," and this grant did not include the power of providing for private lighting. Dillion on Municipal Corporations (4th ed.), Secs. 89, 443; Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla. 229. Mauldin v. City Council, 33, So. Ca. 1. Spaulding v. Peabody, 153 Mass. 129. The general welfare clause did not do away with the limitation contained in the grant of power "to provide for the lighting of the streets." Such clause applies only to "*other act or acts*" than those provided for specifically by the statute. Dillon on Municipal Corporations, 443, 315, 316. State v. Ferguson, 33 N. H. 424.

As said in White v. City of Meadville, 177 Pa. St. 643, quoted in the decision now under discussion. "Both contract-

ing parties must be conclusively presumed to have had in view the law which empowered them to contract, and which became a part of the contract." As has been stated before, the city has never contracted to take for itself, or that its inhabitants should take for themselves either gas, or electricity, from the plaintiff in error or its predecessors. The ordinance was never intended, and does not pretend, to constitute, of itself, a contract between the city and the company for taking, or using either gas or electricity by the city or its inhabitants, but only to regulate certain features of any contract that might be entered into between the city and the company or the company and the people, *viz*: quality of gas, maximum price, *etc.* It does not fix the actual price, period of supply and other essential features of all contracts.

GEO. P. RANEY,

Counsel for Defendant in Error.

NOTE:—The word "other" has been unintentionally omitted from the general welfare clause in the municipal statute as it is quoted on page 9 of the principal brief.

G. P. R.

Supreme Court of the United States.

No. 209.—October Term, 1901.

The Capital City Light and Fuel Company, Plaintiff in Error, vs. The City of Tallahassee. | In error to the Supreme Court of the State of Florida.

[June 2, 1902.]

The plaintiff in error, being the plaintiff below, brings this case here by writ of error to the Supreme Court of the State of Florida for the purpose of reviewing a judgment of that court, affirming the judgment of the circuit court of the second judicial district of that State, dismissing plaintiff's bill of complaint against the defendant with costs.

The bill shows that the Tallahassee Gas and Electric Light Company was incorporated pursuant to the laws of the State, December 20, 1887, for the purpose, as stated in its articles of association, of constructing, maintaining and operating gas works and electric light works in the city of Tallahassee, and for the manufacture of gas for light and fuel, or for the purpose of disposing of or dealing in coal or wood for fuel, and in maintaining and operating electric light machinery for supplying lights in the city, or for manufacturing or dealing in any and all manner of artificial light or heat within that city. After its incorporation the company applied to the city council for the franchise of constructing gas and electric light works in the city for the purposes declared in its charter, and, pursuant to such application, an ordinance of the city council was duly passed on January 4, 1888, the first section of which authorized the company "to construct gas and electric light works in the city of Tallahassee, and for that purpose that the said company shall have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same, and to erect such lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in said city of Tallahassee, and to this end the Tallahassee Gas and Electric Light Company are authorized to make such excavations or erect such structures, poles or towers, and run wires thereto along the streets of said city, as may be necessary or essential. . . . ."

Provision was also made in the ordinance as to the manner of excavating the streets, constructing the works and as to the quality and price of the gas to be furnished and the time within which the gas works should be completed and the plant put in operation. It was also provided that

the company should file a written acceptance of the ordinance, whereupon the same should become binding upon both parties.

Section 7 of the ordinance provided for the completion of the gas works and for operating the same within a short time, stated therein, and ended with the following provision:

"And the said Tallahassee Gas and Electric Light Company shall put in and operate electric lights as soon as sufficient consumers can be secured to pay eight per cent interest per annum on the additional capital required to purchase the machinery for and put in practical operation the said electric lights."

Sections 10 and 11 of the ordinance read as follows:

"SEC. 10. That the said city of Tallahassee, in consideration of the foregoing requirements being complied with on the part of the said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, shall and hereby obligates itself to take all gas which it may wish to use in lighting its streets or buildings from said company at a price of not more than one and one-half dollars ($1.50) per one thousand feet for such as may be used in public buildings used exclusively by said city, and at a price of not more than ($30) thirty dollars per annum for each street lamp as hereinbefore provided for in section six of this ordinance, for the period of twenty-five consecutive years from the completion of said gas works: *Provided*, That nothing herein shall be construed as an obligation on the part of the said city of Tallahassee to take any gas from said company.

"SEC. 11. That the privileges and licenses herein and hereby granted shall be exclusive in and to said Tallahassee Gas and Electric Light Company, their associates, successors and assigns, for and during the term of twenty-five years."

After the adoption of the ordinance the company filed its acceptance thereof, and proceeded to the construction of its gas works, which it completed, and thereafter furnished gas without any complaint until November 8, 1893, when a receiver was appointed, and subsequently its property sold under a foreclosure decree. It was bid in by William A. Rawls, and a deed made to him. Thereafter, and on March 19, 1894, the plaintiff in error was incorporated, and the property conveyed to it by Rawls. It was stated in the articles of incorporation that the general nature of the business of the company to be transacted by it was "to acquire, construct, improve, maintain and operate gas works and electric light works in and adjacent to the city of Tallahassee, in Leon County, State of Florida, and to manufacture gas for light and fuel; to dispose of and deal in coal or wood for fuel; to construct, maintain and operate electric light machinery for supplying lights in and about the said city, or for manufacturing and dealing in any and all manner of artificial light or heat within or adjacent to said city."

The company was incorporated for the purpose of operating under the terms and provisions of the ordinance of the city above mentioned, the

property purchased by Rawls, which he had purchased for the purpose of transferring to the company, and in pursuance of such purpose the property was made over to the company, which entered into the possession and assumed the management and control thereof, and continued the manufacture of gas for the purpose of supplying the city and its inhabitants with light and heat, and it has since coming into the possession of the property enlarged and extended its plant, and met the increased demands of the city and its inhabitants, the city having ever since recognized, treated and dealt with the company as the lawful successor of the Tallahassee Gas and Electric Light Company, and the legal assignee of all the rights, franchises, privileges and contracts created and conferred on that company by the ordinance of the city of Tallahassee.

The legislature on June 5, 1897, passed an act, chapter 4600 of the Laws of Florida, entitled "An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease and establish and maintain within its limits one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided." Thereafter, and on May 27, 1899, the legislature of the State passed another act, to enable the city of Tallahassee to exercise the powers provided by the act of 1897, above mentioned. This act of 1899 granted to the city the right to construct and maintain its own electric light plant upon complying with certain conditions specified in the act. These conditions the city proceeded to comply with, and passed a resolution to build and operate an electric light plant of its own, which was ratified at an election by the people of the city, and the city council was about to proceed to carry out the plan for the erection and operation of such electric lighting plant to light the city under the provisions of the act of 1899, when this suit was commenced.

The plaintiff duly protested at each step against the action of the city council for the erection and operation of such a plant, and claimed that it would be a violation and impairment of the contract which it held with the city, and would very greatly injure, if not ruin, the plaintiff in error. It was also stated that there has never been a time since the establishment of the gas works in that city that the plaintiff in error, or its predecessor, could have procured sufficient consumers to pay eight per cent per annum on the additional capital required to purchase the machinery for and put into practical operation an electric lighting system therein. The bill prayed that the city and its officers might be enjoined from establishing and maintaining an electric plant, and from furnishing electric light to the inhabitants of the city during the balance of the period of twenty-five years for which the exclusive franchise of constructing gas and electric works in that city, and for using the streets thereof for that purpose, and

for furnishing gas and electric light to the inhabitants of the city was granted, to wit, until the year 1913. The bill also prayed that the city should be enjoined from making or entering into any contract or from performing any contract with any corporation or firm for furnishing electric lighting and other machinery, and that the city should be enjoined from issuing its bonds for the payment of any such plant.

This bill was demurred to for want of equity, in that it showed no facts entitling complainant to relief against the defendant as to the matters contained in it. The demurrer was sustained and the complainant's bill dismissed, and the judgment entered thereon was affirmed by the Supreme Court of Florida. (28 Southern Rep. 810; also 42 Fla. ——.)

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The plaintiff in error claims that, under the city ordinance, it has a valid contract for the exclusive use of the streets of the city of Tallahassee for the purpose of furnishing both gas and electric light, and that the subsequent acts of the legislature, providing for the erection and operation by the city of an electric light plant, impair the obligation of its contract, and are therefore void.

As the case involves the provision of the Federal Constitution, which prohibits the States from passing any law impairing the obligation of a contract, and as the State court has given effect to subsequent legislation, which, it is claimed, results in the impairment of the obligation of plaintiff's contract with the city, we are bound to determine for ourselves as to the existence and meaning of the alleged contract, in order to determine the question whether subsequent legislation has impaired the obligation thereof.

Plaintiff in error claims the exclusive right to use the streets and furnish both gas and electric lights by virtue of section 11 of the ordinance of the city council, referred to in the foregoing statement of facts, and by virtue of the provisions of section 38 of the general corporation act of August 8, 1868. We concur in substance in the opinion of the State court of Florida, wherein it stated as follows:

"A careful reading of the ordinance passed in 1888 will show that the city is under no obligation whatever to the appellant or its predecessor company to light the streets and public buildings of the city with either gas or electricity manufactured by said companies. Nothing is said in the ordinance about lighting the streets or public buildings with electricity manufactured by the company. In respect to gas, the city was not required to use any at all, but it obligated itself to take all gas that it might wish to use in lighting its streets and buildings from the company at prices not to exceed the amounts named for a certain term of years. There is no contract, therefore, between the city and the company that

the latter shall have the right to furnish the city for lighting its streets and public buildings, all or any, by electricity used for the purpose, nor is there any stipulation in the ordinance that the city will use nothing but gas, nor that the city will not own or operate an electric light plant for supplying the city and its inhabitants with light. If the city is debarred from erecting an electric light plant by the ordinance passed by it, it is because that ordinance legally grants the company the exclusive privilege and license to use the streets, alleys and lots of the city for the purpose of constructing and operating a plant and its instrumentalities for furnishing electric lights in the city."

The general law of Florida for the incorporation of municipal corporations, passed August 6, 1868, while empowering a city to provide for lighting its streets, and giving to it the power to regulate and control the use of its public streets, gives the city no power to grant an exclusive use of its streets to any person or corporation for the purpose of lighting the city or for providing light to its citizens. The power to obtain such exclusive use of the streets of the city, if not granted by the municipal corporation act of 1868, is said to be found in the general act passed August 8, 1868, or two days subsequently to the above act, and known as chapter 1639 of the Laws of Florida, providing for the incorporation of corporations other than those of a municipal character. Section 38 of such act reads as follows:

"Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation: *Provided, however,* That this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit: the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience and to take private property for the public use, and the like."

The defendant in error contends that the proper construction of that section does not authorize the exclusive use of the public streets of the city for lighting purposes even if consented to by the city; that it cannot reasonably be supposed that the legislature, while omitting to give to cities the power of granting exclusive privileges in its streets for lighting or any other purpose, would, at the same time, by another act, grant to a private corporation incorporated thereunder, the right to the exclusive possession of the streets thereof for the purpose of executing the business for which it was incorporated; that if it were intended that the city should have power to grant such exclusive use it would have been stated in the act providing for the incorporation of cities, and, if it were not so intended, it cannot be implied from the language of the section above quoted, found in an act referring to corporations

other than municipal. The two acts, it is said, must be reconciled, and it can be done by excepting from the application of the thirty-eighth section the right to an exclusive use of the public streets of a city for any purpose. The plaintiff in error concedes that the city has full control and management of its streets, and that the plaintiff could not use the streets for the purpose of laying its pipes, &c., therein without the consent of the city. But it urges that, having secured such consent, it is authorized to maintain the exclusive use by reason of the thirty-eighth section above quoted, even if the city had no right to grant it under the act providing for the incorporation of cities. This question, while stated, was not decided by the court below, and we do not find it necessary to decide it ourselves.

The ordinance adopted by the city council has reference to two absolutely separate and distinct privileges, although they are contained in one and the same ordinance. One privilege is to use the streets of the city for the purpose of laying down gas mains and other pipes, to distribute gas throughout the city and to supply consumers with that article. The other is the right to the use of the streets of the city for the purpose of erecting poles and other things to convey the electricity necessary for lighting purposes. These two privileges are as absolutely separate and distinct as is a privilege to convey by railroad from that by steamboat or by stage coach. It is seen by the terms of the ordinance that it was not contemplated that these different privileges and plants should be availed of and constructed at the same time, but on the contrary the gas plant was to be constructed at once, while the obligation to construct the other was left in abeyance and not to be entered upon until consumers enough could be secured to pay eight per cent per annum on the additional capital required to purchase the machinery for and put in practical operation the lighting by electricity. The two grants might, therefore, have been in two separate ordinances and given to separate persons, firms or corporations. The operation of one would not interfere with that of the other, except perhaps on a question of financial success, but so far as the character of the two grants is concerned, each one is wholly separate and distinct from the other.

The city has never been under any obligation to take electric lighting from the corporation, even after the plant had been erected and was in operation. The exclusive character of the privilege, assuming it to exist by virtue of section 38 of the corporation law, already referred to, does not commence until the company has begun to do the thing required by the ordinance, as the consideration for the grant of the privilege. Nothing has been done by the plaintiff in error towards commencing work looking to the erection and operation of the electric plant. Upon this subject the Supreme Court of Florida stated as follows:

"It appears from the pleadings that neither the Tallahassee Gas and Electric Light Company nor the appellant company ever established an electric light plant in the city of Tallahassee in pursuance of the authority conferred upon either of them. From the organization of the first company up to the time the gas plant was sold at judicial sale about six years had elapsed, and from the time of the judicial sale to the time the city began proceedings to enable it to establish an electric light plant about six years more elapsed. During all this period of time neither company attempted to construct an electric light plant as authorized by its charter. In the meantime that provision in the general incorporation law relating to exclusive privileges had been repealed by the legislature of 1891, and an act passed in 1897 specially authorizing cities and towns to establish gas and electric light plants to supply themselves and their citizens with light, and still later, in 1899, special legislative authority was given the city of Tallahassee to establish an electric light plant. Neither the Tallahassee Gas and Electric Light Company nor appellant company has acquired any vested right to erect an electric light plant by the investment of any money in any such plant, and the question arises as to whether or not any constitutional right has been impaired by the repeal of the statute granting the alleged exclusive privilege and by the legislation authorizing the city to do that which is a public benefit, and that which for some twelve years the companies have neglected to do as authorized by their charters and the city ordinance. We are unable to see that any vested right of either company, so far as the establishment of an electric light plant is concerned, is impaired by the legislation which authorized the city to do that which it now proposes to do. In the first place, the statute, properly construed, does not grant the exclusive privilege in respect to the electric light plant as claimed. A grant of exclusive privileges to appellant's predecessor would be the grant of a franchise from the State, the possession of which would enable it to obtain a practical monopoly of the gas and electric light business in Tallahassee for the term specified. All such grants are strictly construed against the grantee, and nothing passes thereby but such as is clearly intended. (*Saginaw Gas Light Company* v. *City of Saginaw*, 28 Fed. Rep. 529; *Florida, Atlantic & Gulf Central Railroad Company* v. *Pensacola & Georgia &c. Company*, 10 Fla. 145.) Under the express language of this statute the exclusive privilege did not attach until the corporation was not only organized, but put into successful operation, and the privileges were to attach for twenty years from the time the corporation commenced to carry out in good faith the terms of its articles of incorporation. The condition upon which the exclusive privilege, so far as the electric light plant was concerned, attached, has never been performed, for the company has never been put into successful operation, so far as that branch of its business is concerned, nor has it ever commenced to carry out in good faith the terms of its articles of incorporation in regard to erecting an electric light plant. The first company never acquired the right to the exclusive privilege mentioned in the statute, because it failed to perform the condition precedebt, and therefore it had no exclusive privilege to transfer to appellant company, so far as the electric light plant is concerned. In the next place, even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right

so as to be protected by the constitution of the State or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege. (*Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646; *Louisville & Nashville Railroad Company* v. *Kentucky*, 161 U. S. 677. See also *Chincleclamouche Lumber & Boom Company* v. *Commonwealth*, 100 Pa. St. 438.)

* * * * * *

"Our attention is called to that clause in the seventh section of the city ordinance which required the company to put in electric lights only when sufficient consumers could be secured to pay eight per cent interest per annum on the additional capital required to purchase the machinery and put in successful operation electric lights. It would appear from this clause that from the beginning the company only intended to avail itself immediately of that provision of its charter authorizing it to erect a gas plant and to use the other power granted by its charter, together with the city ordinance, to shut out competition in its business from electric light companies, intending only to put in an electric light plant whenever that plant could be made to secure it an annual profit on its investment in that plant of eight per cent. It is quite apparent that the legislature never intended to secure to it any such right, but, on the contrary, intended the privilege to extend only so far as to secure the company from competition in matters wherein it has complied with its charter by being put into successful operation. We have seen that the city had no authority to grant exclusive privileges to use its streets for the purpose of furnishing light from gas and electricity, but even if it did have such power it could not confer such exclusive right and at the same time defer construction of the plant until such time as it could be made to pay eight per cent upon the investment. The effect of such a provision in an ordinance like the one we are considering is that the city will not permit any other person or corporation to use its streets for the public purpose of furnishing electric lights for twenty-five years, but at the same time will not require the person or corporation to whom the exclusive privilege is granted to furnish such lights until such time as it can make an annual profit of eight per cent on its investment. The city has no such power over its streets, which are held by it in trust for the public benefit, (*Florida Central & Peninsular Railroad Company* v. *Ocala Street & Suburban Railroad Company*, 39 Fla. 306; *Gonzalez* v. *Sullivan*, 16 Fla. 791, 820,) and even if it did, so long as the grantee failed to invest money in a plant, the ordinance could be repealed or modified, being without consideration.

"We have not overlooked the fact that the first company performed its charter powers in part by erecting and operating a gas plant, and as to that plant, and the business connected therewith, it may have possessed exclusive privileges under the statute which could not be impaired by subsequent legislation, and it may be that such privileges passed to appellant through the judicial sale. As to that we express no opinion. But while the purpose of erecting both plants would be the same, in that they would both furnish light to the city and its people, yet they furnish a different light and require separate and different plants and instrumentalities for their operation. We think they are so distinct in character as to amount to separate undertakings, and they are so treated in the articles of association of both companies, and in the ordinance. Power to operate the one would not include power to operate the other, and permission to use the

streets for one would not include permission to use them for the other. (*City of Newport* v. *Newport Light Company*, 89 Ky. 454.) The exclusive privileges as to the electric light plant could not have operated as a consideration for erecting the gas plant, for such privileges under the statute were to attach to the electric light business only when that plant was put in."

We concur in the result arrived at in the foregoing extract from the opinion of the State court, and, in common with that court, we hold that there has been no impairment of any contract between the city and the plaintiff in error or its predecessor, and that the city has the right to avail itself of the privileges granted by the acts of 1897 and 1899 of the legislature already mentioned, so far as regards the electric lighting of the city.

The judgment is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.